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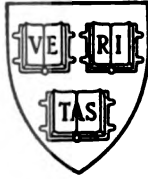
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COMMON LAW PROCEDURE ACTS, *c#*

1853, 1856, 1870:

WITH AN APPENDIX,

CONTAINING THE

GENERAL ORDERS OF THE SUPERIOR COURTS
OF COMMON LAW,

AND

A COLLECTION OF STATUTES RELATING TO THE LAW
OF EVIDENCE, AND TO PROCEDURE,
AND GENERAL MATTERS.

0

BY

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AND

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DUBLIN:

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PREFACE.

UPWARDS of fourteen years have now elapsed since the publication of the last edition of Mr. Ferguson's valuable work on the Common Law Procedure Acts. During that period numerous cases have been decided both in this country and in England, affecting the practice of the Superior Courts of Common Law, and several important Statutes relating to the same subject have also been enacted. Under these circumstances the editors have considered that a new treatise on the Common Law Procedure Acts would be found to be of use, and they have accordingly prepared the present work. In the preparation of it, they have endeavoured to collect the reported cases bearing upon the several sections of the Acts down to the latest period. They have also added an Appendix containing the General Orders of the Superior Courts, and a collection of Statutes relating to the law of evidence, and to procedure and general matters, which they considered would be serviceable in practice. The Common Law Procedure Act of 1870 will be found in the

body of the work, and the several cases relating to the practice under it have been referred to in the notes.

In conclusion, the Editors have to acknowledge the assistance they have derived from the text books on various branches of the law, and have also to express their thanks for numerous suggestions communicated to them by several friends during the progress of the work.

July, 1871.

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ADDITIONS AND CORRECTIONS.

- Page 4, line 12, for "33 & 34 Vict. c. 103," read "33 & 34 Vict. c. 109."
- 16, for "post, in the Appendix," read "post, p. 368."
- 30, — 36, add:—It has however been held in *Kelly v. Dixon* (Q. B., M. T., 1870, not yet reported), that the Court has jurisdiction under the above section to allow a defendant out of the jurisdiction to be served with the writ of summons and plaint, through the post office or otherwise, even in cases where the defendant has no agent resident within the jurisdiction.
- 50, — 9, 10, for "post, in the Appendix," read "post, p. 368."
- 145, — 29, for "27," read "207."
- 184, — 14, add:—In *Long v. Mooney* (Ex. T. T. 1871, not yet reported), the executors of a deceased plaintiff having obtained a conditional order for leave to enter a suggestion under the above section, which order was duly made absolute, filed the suggestion, and marked judgment without serving the defendant with a copy of the suggestion or notice of filing; and the Court on a motion to set aside the judgment for irregularity held that the judgment was regularly marked.
- 187, — 10, for "verdict," read "judgment."
- 227, — 15, for "one several," read "one of several."
- 235, — 10 from bottom, for "suggestion," read "question."
- 289, — 4 from bottom, for "partly," read "party."
- 318, — 13, add:—In *Kenna v. Connor* (C. P. T. T. 1871, not yet reported), the party appealing having delayed in furnishing the case for appeal, after having given bail, the Court made an order requiring him to state the case within twelve days.
- 337, — 5, add:—Where, after an order to attach a debt due to the defendant had been obtained, but before an order to pay was made, the plaintiff issued a *ca. sa.* under which the defendant was arrested, it was held, *per Keogh, J.*, that the *ca. sa.* was regular, and a motion to discharge the defendant was therefore refused (*Speer v. Brennan*, C. C. T. V. 1871, not yet reported).
- 372, — 6, add:—L. R. 6 Ex. 35.
- lxiv, — 8 from bottom, for "31st," read "38th."

THE
COMMON LAW PROCEDURE AMENDMENT ACT
(IRELAND), 1853.

16 & 17 VICT. CAP. 113.

*An Act to amend the Procedure in the Superior Courts of
Common Law in Ireland.* [20th August, 1853.]

WHEREAS it is expedient to simplify and amend the course of procedure as to the process, practice, pleadings, and evidence in the Superior Courts of Common Law in *Ireland*, so as to make the same less dilatory and expensive, and to prevent substantial justice from being defeated by reason of the variety of forms of action, and the technicalities and prolixity of pleadings, and the unnecessary length of records, and to consolidate the provisions of several Statutes and rules of Court relating to such proceedings: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The provisions of this Act shall come into operation on the first day of *January*, one thousand eight hundred and fifty-four. Commence-
ment of Act.

2. In citing this Act in any instrument, document, pleading, proceeding, or Act of Parliament, it shall be sufficient designation to use the expression, "The Common Law Procedure Amendment Act (*Ireland*), 1853." Short title of
Act.

Repeal of
former Acts.

3. From and after the commencement of this Act, the several Acts, and parts of Acts, set forth in the Schedule A. to this Act annexed, so far as the said Acts, or parts of any Act, relate to personal actions, or actions of ejectment in the Superior Courts of Law in *Ireland*, and no further or otherwise, and to the extent to which such Acts, or parts of Acts, are by such Schedule expressed to be repealed, are hereby repealed (*a*), except as to anything done before the commencement of this Act, and except so far as may be necessary for the purpose of supporting and continuing any proceeding heretofore taken upon any action brought before the commencement of this Act, and except as to the recovery or application of any penalty for any offence which shall have been committed before the commencement of this Act.

How far the
former Acts
are repealed.

(*a*) The effect of this section is to repeal the several Acts specified in the Schedule so far only as they relate to the form of action and procedure, but to leave untouched any *right* of action created thereby. Accordingly, it has been held that, although this section purports to repeal the 6 Anne, c. 10, s. 23 (*Ir.*), by which an action of account is given to one tenant in common against his co-tenant, such tenant in common may still bring an action for not accounting against his co-tenant (*Kearney v. Kearney*, 13 *Ir. C. L. R.* 314; *Garrett v. Cullen*, 8 *Ir. Jur. N. S.* 154).

With respect to the interpretation of words in this Act :

Interpreta-
tion of terms.
15 & 16 Vict.
c. 76, s. 227.

4. In the construction of this Act the word "Court" shall be understood to mean any one of the Superior Courts of Common Law at *Dublin*, in which any action is brought ; and the word "Judge" shall be understood to mean a Judge or Baron of any of the said Courts ; and the word "Master" shall be understood to mean a Master of any of the said Courts ; and the word "action" shall be understood to mean any personal action brought in any of the said Courts ; and no part of the United Kingdom of *Great Britain* and *Ireland*, nor the Islands of *Man*, *Guernsey*, *Jersey*, *Alderney*, or *Sark*, nor any islands adjacent to any of them, being part of the dominions of her Majesty, shall be deemed to be "beyond the seas" within the meaning of this Act ; and the word "county" shall be taken to extend to and include, where necessary and consistent, any city, county of a city, or county of a town or city, and county of any place, as the case may be ; and the word "party" or "person" shall extend to and include any corporation or other public body ; and the word "affidavit" shall include an affirmation or declaration made

by any person who is empowered to give evidence by affirmation or declaration in lieu of oath ; and no provision requiring the affidavit of, or any act to be done by the attorney, or the signature of attorney or counsel, or service on the attorney, shall apply to cases where the plaintiff or defendant shall sue or defend in person, but all such acts shall be done by, and notices given to the party so suing or defending in person ; and wherever in this Act, in describing or referring to any person or party, matter or thing, any word importing the singular number or masculine gender is used, the same shall be understood to include and shall be applicable to several persons and parties as well as one person or party, and females as well as males, and bodies corporate as well as individuals, and several matters and things as well as one matter or thing, unless it otherwise be provided, or there be something in the subject or context repugnant to such construction.

With respect to the forms of action, and the manner of commencing them :

Forms of action and commencement.

5. The special forms of personal actions heretofore used shall not be necessary, and it shall be sufficient in the summons and plaint hereinafter mentioned to state a cause or ground of action good in substance, according to the provisions of this Act, without framing the statement in any particular form, as formerly used or known, such as of assumpsit, account, debt, covenant, detinue, trespass, trespass on the case, trover, or replevin (*b*).

Special forms of personal actions abolished.

15 & 16 Vict. c. 76, s. 3.

(*b*) By this and the following section the old forms of personal actions are abolished, and in their place a new action, called a "*personal action*," is substituted, which, by sect. 8, is to be commenced by a writ of summons and plaint.

Personal actions.

Although, however, the *forms* of personal actions have been abolished, the distinction between the different causes of action, upon which the old forms were founded, must be carefully attended to in framing the summons and plaint, as such distinction is often the test of substantial liability (*Sharrod v. London & S. W. Railway Co.*, 4 Ex. 580). Accordingly, if it be uncertain whether the cause of action relied on be in trespass or in case, the summons and plaint may be set aside (*Harrington v. Murphy*, 3 Ir. L. T. 407 ; *Allen v. M'Combe*, 8 Ir. Jur. N. S. 310). So also a count in debt for unliquidated damages has been set aside (*Inglis v. M'Blaine*, 10 Ir. Jur. N. S. 119) ; and see *Bracegirdle v. Hinks*, 9 Ex. 361.

One form personal action and action of ejectment.

6. The right to recover any debt or damages or personal chattel, in respect of any matter of contract or of tort, or taking or detention, which might have been heretofore the subject of any action of debt, covenant, assumpsit, account, trespass, trespass on the case, trover, replevin, or detinue, shall and may be enforced in an action to be called a "a personal action;" and all actions of "ejectment" shall henceforth be commenced and prosecuted in the manner hereinafter provided (c).

Real actions.

(c) The section provides for personal actions only; and accordingly actions of right of dower, dower, and *quare impedit*, continued until recently to be commenced and prosecuted as formerly. By the 33 & 34 Vict. c. 109, however, such actions are now to be commenced by a writ of summons and plaint in the same manner as an ordinary action. As to the form of the summons and plaint in such an action, and the subsequent proceedings therein, see the Act *post*, in the Appendix.

Court to have like jurisdiction as heretofore.

7. The Court, or any Judge thereof, shall have and exercise, in and about any matter brought before such Court or Judge, in any such personal action or action of ejectment, under the provisions of this Act, the same jurisdiction, power, authority, and discretion, to all intents and purposes, as such Court or Judge could have exercised in an action for the same purpose instituted in the manner heretofore used; and all orders and judgments of the said Court or Judge (d) may be enforced by the same process, and shall be subject to review by a Court of Error, in the same manner in all respects, except as herein provided, as if the same had been made in an action instituted as heretofore used.

When appeal lies from a Judge in chamber.

(d) An order of a Judge in Chamber is also subject to review by the Court in the same cases that it might have been reviewed previous to the Act; and it may therefore be useful to state here when an appeal lies from the decision of a Judge in Chamber. As a general rule, an appeal lies in every case, even where the original jurisdiction to make an order is conferred by Statute upon a Judge, and no mention is made of the Court (*Fowler v. Churchill*, 2 Dowl. N. S. 562; *Brown v. Bamford*, 9 M. & W. 42; *Grady v. Hart*, 3 Ir. C. L. R. 522). But if the Judge refuses to make an order, the Court cannot make it on appeal, if the Statute confers the original jurisdiction upon the Judge. In such a case, however, the Court may rescind the Judge's order refusing the application (*Wearing v. Smith*, 9 Q. B. 1024). No appeal lies where the matter is left entirely to the discretion of the Judge (*Burman v. Howard*, 25 L. J. Ex. 289; *Tomlinson v. Goutly*, L. R. 1 C. P. 230); nor where the appeal is sought to be brought upon a mere question of costs (*Davy v. Brown*, 1 Bing. N. C. 460); except in

an extreme and clear case (*Teggin v. Langford*, 10 M. & W. 566; *Hargrave, v. Holden*, 3 Dowl. 176).

Where an order has been made by a Judge, the course to be adopted by a party dissatisfied with it, is to move to vary or set aside the order so made (*Cator v. Flattery*, 8 Ir. Law. Rep. 117). And in such a case the notice of motion should state the grounds on which it is sought to vary the order: 131 G. O., 1854. If, on the other hand, the Judge has refused to make an order, the course is to renew the application to the Court, which cannot be done, however, where the Judge possesses the original jurisdiction (*Wearing v. Smith*, *ubi supra*).

How brought.

The same affidavits and other materials as were used before the Judge should be used upon the application to the Court; and in *Doshell v. Anderson*, 6 Ir. C. L. R. 1, the Court held that no further affidavits could be employed; and see *Alexander v. Porter*, 1 Dowl. N. S. 299. It has, however, been frequently held that further affidavits may be used (*Gibbons v. Spalding*, 11 M. & W. 174; *Pike v. Davis*, 6 M. & W. 546).

What affidavits may be used.

When the party appealing succeeds, he gets no costs of the appeal (*Rodocanachi v. Soderholm*, 3 Ir. C. L. R. 531; *Hargrave v. Holden*, 3 Dowl. 176).

Costs.

8. All such personal actions, whether brought by or against any person entitled to the privilege of peerage or of Parliament, or of the Court in which the action shall be brought, or of any other Court, or to any other privilege, or by or against any corporation or incorporated body or company, or by or against any other person, shall be commenced by a writ of summons and plaint, according to the form marked No. 1 in the Schedule B. to this Act annexed, and which shall be called a "writ of summons and plaint" (e), and shall be authenticated by the common seal of the said superior Courts, to be thereunto set by the Clerk of the Writs (f), who shall not be required to sign such writ, but shall enter the particulars thereof in the book to be kept for that purpose, at the time of sealing thereof, and such writ shall bear date of the day on which it shall be sealed (g), and may be sued out at any time, notwithstanding any privilege (h).

Actions to be commenced by writ of summons and plaint.

15 & 16 Vict. c. 76, s. 5.

(e) This and the following sections provide for the form of the summons and plaint. It must, when the plaintiff's demand is for a debt or liquidated sum, be indorsed with the particulars of the demand (sect. 11). It must also contain or be indorsed with the name and place of abode of the attorney suing it out, or of the plaintiff, if he sues in person. And, in addition, the 7th G. O., 1854, and 1st G. O. of 22nd January, 1856 (which see), require certain other indorsements to be made upon the plaint. An omission of any of these indorsements is an irregularity for which the writ may be set aside or ordered to be amended (*Powell v. Price*, 3 Ir. C. L. R. 232; *Fitzgerald v. Brown*, 3 Ir. C. L. R. 253); and the filing of the plaint is not a fresh step after knowledge of the irregularity, within the meaning of the 179th G. O., 1854. A notice of motion to set aside the writ for such an irregularity should

Indorsements on the plaint.

How irregularity taken advantage of.

specify the irregularity, 179 G. O., 1854; and the motion should not be made until the writ is filed (*O'Brien v. Taylor*, 2 Ir. Jur. N. S. 53).

In addition to the indorsements spoken of above, the writ will in certain particular cases require to be specially indorsed. When issued under the Summary Procedure on Bills of Exchange Act, it must contain the notice directed by that Act. If the plaintiff claims a writ of injunction under the C. L. P. Act, 1856, sect. 81, it must be indorsed with the notice mentioned in sect. 82 of the Act. And see, as to the delivery of particulars with the plaint, sect. 11, note (g), *post*.

The writ should follow the form given in the schedule to the Act, with such changes as the circumstances of the case may require. As to the consequences of any error or omission in the plaint or the copy of it served, see *post*, sect. 16, and the notes thereto.

By the 34th G. O., 1854, each cause of action in a plaint should be commenced in a new paragraph; and therefore, where in a summons and plaint the money counts did not commence in a new paragraph, the plaint was ordered to be amended at the plaintiff's cost (*M'Anulty v. Nantes*, 13 Ir. C. L. R. Ap. 40). See, however, *Redmond v. Butler*, 4 Ir. C. L. R. 287.

(f) When a writ of summons and plaint has been sealed, it cannot be altered without the leave of the Court (*Freeman v. Kellett*, 8 Ir. C. L. R. 42; 40 G. O. 1854). A mere misprision may, however, it would seem, be corrected without the order of the Court, provided the correction be made on the day the writ is issued; and, therefore, where a summons and plaint in ejectment was issued, the venue in the margin of which was incorrect, although the county in which the lands lay was correctly stated in the body of the plaint, and the mistake was corrected on the same day without the order of the Court, and the writ resealed, it was held that the correction without order did not vitiate the further proceedings in the action (*Hanbury v. Jones*, 15 Ir. C. L. R. 442). Where an alteration is made in a writ after sealing, and before service, it must be resealed before it can be served (*Cooper v. Kirby, Long & Town*, 677); unless the alteration has been made in pursuance of an order, or by leave of the Court or a Judge (*Brown v. Fullerton*, 13 M. & W. 557). But if the opposite party, after notice of the alteration, allows the proceedings to go on, he cannot afterwards move to set them aside (*Freeman v. Kellett*, *ubi supra*; *Siggers v. Sanson*, 2 Dowl. 745).

(g) Notwithstanding the above enactment, when a writ is amended and resealed, the date need not be altered to make it correspond with the time of resealing (*Gibson v. Vorley*, 7 E. & B. 49; *Lalor v. Bland*, 8 Ir. C. L. R. 115). And where a writ was amended by substituting the real for the nominal defendant, it was ruled that the commencement of the action reckoned from the date of the writ and not from the amendment (*Coombs v. Bristol & Exeter Railway Co.*, 1 F. & F. 206).

The Court has no power to antedate a writ, even to prevent the operation of the Statute of Limitations (*Clark v. Smith*, 2 H. & N. 753).

(h) The section does not obviate the necessity of giving notice of action in cases required by statute (sect. 19). So, also, if the action be brought against a magistrate, the writ may be set aside in cases falling within 12 Vict. c. 16, s. 7 (*Lalor v. Bland*, 8 Ir. C. L. R. 115).

9. In every such writ of summons and plaint, and copy thereof, the names of the plaintiff and defendant (i), the place of residence of the plaintiff, and the place of residence

Causes of action in separate paragraphs.

A sealed writ cannot be altered without leave.

When altered must be resealed.

Date from which amended writ runs.

Residence and description of parties to be mentioned in writ.

or supposed residence or last known residence of the defendant (*j*), and such designation or description of the parties respectively as the plaintiff or his attorney may be able to give (*k*) shall be mentioned, and such writ shall contain the names of all the defendants, and shall not contain the name or names of any defendant or defendants in more actions than one.

15 & 16 Vict.
c. 76, s. 4

(*i*) A misnomer was formerly ground for a plea in abatement, but now under 3 & 4 Vict. c. 105, s. 40, such a defence cannot be pleaded, and the defendant's course in such a case is to point out the misnomer by notice to the other side pursuant to sect. 84, *post*, and follow up such notice, if necessary, by an application to the Court. Unless, however, the misnomer is calculated to mislead, it would be considered as only a technical error under sect. 16, and the Court would refuse to set the writ aside (*Dunne v. Gray*, 6 Ir. Jur. O. S. 138). A misnomer, however, if not corrected, may cause considerable embarrassment after judgment has been entered up (*Pattison v. M'Clatchy*, 2 Law Rec. N. S., 8; *Williams v. Lowe*, 6 Ir. Jur. O. S. 115).

Consequences of a misnomer.

If a party suffer judgment to be obtained against him by a wrong name, his goods may be taken in execution under a writ sued out against him by that name (*Furlong v. Handcock*, Hay. & Jon. 244).

Judgment obtained against person by a wrong name.

By 3 & 4 Vict. c. 106, s. 41, in an action on a written instrument it is sufficient to designate the Christian names of any of the parties, by any contractions thereof used in the written instrument. See further on the subject of misnomer, Ch. Arch. Pr. 12th Ed. p. 167, and the notes to sect. 84, *post*.

Contraction of name when action on a written instrument.

(*j*) If the residence of the plaintiff or defendant be misdescribed, and the defendant, in consequence is misled or prejudiced—as, for instance, if the description in the summons and plaint represents the plaintiff and defendant as residing in different Civil Bill jurisdictions in cases falling within section 97 of the Common Law Procedure Act, 1856—the defendant may apply to have the writ set aside or amended (*Adams v. O'Brien*, 5 Ir. Jur. O. S. 40; *Silk v. Armstrong*, Ir. R. 2 C. L. 155, in which case the action was brought under the Summary Procedure on Bills of Exchange Act). The application to set the writ aside should be made within a reasonable time (*Roche v. Wilson*, 3 Ir. C. L. R. 252). In *Curry v. Johnson*, 2 Ir. C. L. R. 641, where the residence of the plaintiff was altogether omitted, the Court refused the plaintiff leave to amend.

Consequence of misdescription of residence.

As to what constitutes a residence, it would seem that the house in which a person resides with his family, and sleeps, and not the house at which he transacts his business, is his "residence" (*Tom v. Nagle*, 13 Ir. C. L. R. App. 38), with which compare *Wright v. Brown*, 1 Ir. L. T. 102. But it would also appear that an office or place of business is a "residence" within the meaning of sect. 97 of the C. L. P. Act, 1856. Thus in *D'Arcy v. Hastings*, 10 Ir. C. L. R. App. 24, where plaintiff had an office within the same Civil Bill jurisdiction as that in which the defendant resided, he was held not to be entitled to any costs, the action being one of contract, and the plaintiff having recovered less than £20. And see further as to the question of "residence," sect. 97 of the C. L. P. Act, 1856, *post*; and *Moffatt v. M'Ternan*, 6 Ir. Jur. O. S. 177; *Dawson v. Coleman*, 15 Ir. C. L. R. 508.

What is a residence.

Where corporation is to be considered as residing.

A corporation is to be considered as residing where it carries on its business (*Taylor v. Crowland Gas Co.*, 11 Ex. 1). Thus, a company formed for the manufacture and sale of goods dwells at the place of manufacture and sale, and not at the registered office of the company (*Keynsham Blue Lias Lime Co. v. Baker*, 2 H. & C. 729); and a railway company is to be deemed to dwell at the principal office, and not at every station on the line (*Adams v. Great Western Railway Co.*, 6 H. & N. 404).

The defendant may, after judgment, show on the taxation of costs, that the residence of either the plaintiff or himself is incorrectly described (*D'Arcy v. Hastings*, 10 Ir. C. L. R. App. 24; *Scott v. Bennett*, Ir. R. 3 C. L. 217, 238, 240). As to how far the defendant is concluded, when final judgment has been signed for debt and costs, by the statement of his residence contained in the plaint, see *M'Kenna v. Sexton*, 8 Ir. Jur. N. S. 216.

Description of parties.

(k) The Court will not set aside a writ because it does not contain any designation or description of the parties, unless the omission be calculated to mislead (*Kelly v. Brophy*, 5 Ir. C. L. R., 279; *Dunne v. Gray*, 6 Ir. Jur. O. S. 138).

Form of plaint.

10. Such summons and plaint shall contain a true and succinct statement of the plaintiff's cause or causes of action (l); and if the plaintiff shall sue, or the defendant be sued, otherwise than in his own right, shall also state the character in which and the title by which he sues, or in respect of which the defendant is sued (m), and shall also state the relief which the plaintiff requires (n), and the venue or county in which he proposes to have any issues in fact tried (o).

Form of plaint.

(l) This section does not prevent the plaintiff from having several counts in his plaint founded on the same cause of action, provided they do not appear to have been unnecessarily restated with a view to embarrass the defendant (*Harrison v. Lynch*, 3 Ir. C. L. R. 527). As to what constitutes a true and succinct statement of the cause of action, reference must be had to the works upon pleading; and see *post*, sects. 53, 81, and 83, and the notes thereto. In *Hunter v. Hunter*, Ir. R. 3 C. L. 138, it was held that in an action against executors for work and labour done for their testator, the ordinary *indebitatus* count was sufficient, although part of the agreement was, that the work was not to be paid for by the testator until the happening of an event which did not happen till after his death. As to the necessity of commencing each cause of action in a new paragraph, see note (e), *supra*.

Character in which action brought to be stated.

(m) The character in which the plaintiff sues or the defendant is sued should be stated in the body of the plaint. An omission in this respect will not be cured by the statement in the title. (*Stephenson v. Quinn*, 7 Ir. C. L. R. 314). This section, however, does not apply to actions of ejectment (*Swanton v. Gould*, 9 Ir. C. L. R. 234). As to an action by the public officer of a banking company, see *Murray v. Comyn*, 11 Ir. C. L. R. 239.

How stated in actions brought by assignees.

In a writ of revivor it is sufficient to describe the plaintiff generally as assignee of the conusee (*Stapleton v. Bergin*, 4 Ir. C. L. R. 421); and so also in an action by the assignee of a reversion upon a covenant contained in a lease (*Lindsay v. O'Neill*, 5 Ir. C. L. R. 461, *per* Monahan, C. J.). As

to an action by the assignee of debts due to a bankrupt under sect. 291 of the Bankruptcy Act, see *Moran v. Ward*, 5 Ir. Jur. N. S. 102).

(*) Where the plaintiff's demand is for a debt or liquidated sum, the prayer for judgment should state truly in one sum the amount sought to be recovered: 1 G. O., 22nd January, 1856; and see *Mordant v. Ryan*, 5 Ir. Jur. O. S. 274; *Walkington v. Greer*, 8 Ir. Jur. N. S. 239, as to the necessity of stating truly the amount claimed.

Prayer for judgment should state sum truly.

In replevin it would appear that the prayer for judgment need not pray a return of the goods, as the goods are returned by the process, and not by the judgment of the Court (*Gibbons v. M'Evilly*, Ir. R. 1 C. L. 453).

What it should pray in an action of replevin.

The plaintiff cannot recover larger damages than the sum mentioned in the prayer for judgment (*Chevely v. Morris*, 2 Wm. Bl. 1300), unless leave to amend be given. And see *Butler v. Tighe*, 3 Law Rec., O. S. 63, in which case a blank had been left in the prayer.

Plaintiff confined by sum named.

If the plaint shows a breach of an entire contract, but claims damages for a partial breach only, the plaint will be demurrable (*Blount v. Evans*, 5 Ir. C. L. R. 371; *Kingsley v. Hackett*, 14 Ir. C. L. R. 58).

Partial breach shown.

(o) Where the venue was stated as "City of Dublin," it was held to be a sufficient statement (*Courtenay v. Blake*, 8 Ir. C. L. R., Ap. 49). If the venue be omitted, the Court will give leave to amend the omission (*Twomey v. Formey*, 7 Ir. Jur. O. S. 138).

Description of venue. Omission to state any.

11. The particulars of the plaintiff's demand (*p*), where the same shall be a liquidated or money demand (*q*), and of all credits (*r*) to which the defendant may be entitled, and of the balance, if any, claimed by the plaintiff, shall be endorsed on the summons and plaint, and on the copies thereof for service, unless a detailed statement of the said particulars shall have been furnished to the defendant previously, in which case it shall be sufficient to make reference to the statement so furnished (*s*), and to mention the balance claimed to be due on foot thereof, or unless the said demand shall consist of so many items or particulars that they cannot be conveniently endorsed thereon, in which case the plaintiff shall cause particulars engrossed on parchment to be annexed to said summons and plaint, and copies thereof, on parchment or paper, to be annexed to the copies of such summons and plaint intended for service, to be incorporated therewith by proper reference (*t*), and shall cause the same to be served on the defendant, together with the summons and plaint, and such endorsement or paper annexed shall be considered as particulars of demand, and no further or other particulars need be delivered, unless ordered by the Court or a Judge (*u*)

Particulars of demand and credits to be indorsed.

(*p*) The particulars should be explicit and full, so as to afford the defendant an opportunity of knowing the specific demand made. And the

What particulars should state.

dates, amounts, and nature of the items sought to be recovered, and of the credits allowed should be specified (*Neville v. Gollock*, 6 Ir. Jur. O. S. 232). Thus, where an item was described as money paid for the plaintiff, the particular was held insufficient (*Mahoney v. Falvey*, 7 Ir. Jur. O. S. 131). Where the defendant is not in a position to be conversant with the subject matter of the suit, the particulars should be fuller than otherwise (*Prichard v. Nelson*, 16 M. & W. 772). If, however, in consequence of the nature of the demand, or from other causes, it be not possible for the plaintiff to give the dates, &c., he will not be ordered to furnish further particulars (*Curly v. Clarke*, 8 Ir. Jur. N. S. 132; *Redmond v. Broe*, 7 Ir. Jur. N. S. 275), unless, of course, his inability arise from his stating a case in the plaint which he is not in a position to prove (*Mahoney v. Falvey*, *ubi supra*). In an action on the money counts the plaintiff need not specify to which of the counts in the plaint the particulars refer (*McGuinness v. Meehan*, 7 Ir. Jur. N. S. 13).

Should not contain traversable statements.

The particulars should not contain any allegations which might be demurred or pleaded to if contained in the pleading (*Roches v. Colclough*, 5 Ir. C. L. R. 538). The defendant's course under such circumstances would be to apply to the Court by motion, but he should not demur or plead to such allegations (*Sigsworth v. Farrell*, Ir. R. 2 C. L. 321).

Plaintiff restricted by his particulars. Amendment.

At the trial the plaintiff will be confined in his proof by the particulars delivered. The plaintiff may, by leave of the Court amend the particulars: (sect. 46). He may also obtain leave to amend them at the trial (*Savage v. Canning*, Ir. R. 1 C. L. 434).

When particulars must be given.

(g). As to what is a liquidated or money demand, see sect. 96. Although the Statute requires an indorsement of particulars only in cases of a liquidated or money demand, yet the Court may order particulars in other cases, if it thinks fit so to do; see the notes to sect. 46, *post*. In actions under Lord Campbell's Act, 9 & 10 Vict. c. 93, particulars of the persons on whose behalf the action is brought, and of the nature of the claim, must be delivered with the plaint. And in actions for breach of a patent, or of a copyright, particulars of the breaches must be delivered. An omission to do so does not, however, render the plaint demurrable (*Murphy v. Logan*, 10 Ir. C. L. R. 87).

(r). Where a payment has been made generally, the plaintiff will not be ordered to specify the items of his demand to which the payment is to be appropriated (*Kelly v. Hoey*, 2 Ir. Jur. N. S. 394).

Payment or set off of which particulars are given need not be pleaded.

By the 42nd G. O., 1854, "where the plaintiff, to avoid the expense of a defence of payment or set-off, shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, or which the plaintiff admits the defendant is entitled to set off, it shall not be necessary for the defendant to plead the payment or set-off of such sum or sums of money. But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand states that he seeks to recover a certain balance, without giving credit for any particular sum or sums, or to cases of set off where the plaintiff does not state the particulars of such set off." The consequence is, that if the plaintiff claims a balance only and omits to give particulars of the credits allowed, he will be considerably embarrassed in case the defendant pleads a defence of payment or set off founded upon the credits in question.

Where particulars of the credits are given, and the defendant notwithstanding pleads them again, the plaintiff may at the trial show that the credits pleaded are identical with those already given credit for (*Townson v. Jackson*, 13 M. & W. 374; *Eastwick v. Harman*, 6 M. & W. 13).

(a) If the plaintiff in his particulars refers to an account furnished, he may be ordered to re-furnish it, if necessary (*Steele v. Leadbetter*, 3 Ir. L. R. 376). Referring to an account.

(t) See 55th G. O., 1854.

(u) If the plaint is not indorsed as required, it may be set aside as irregular (*Smith v. Gilroy*, 7 Ir. Jur. O. S. 47; *Murphy v. Logan*, 10 Ir. C. L. R. 87). The Court would, however, in such a case give leave to amend. As to setting aside a judgment marked where no particulars have been indorsed on the plaint, see *Beatty v. Eeklin*, 2 Law Rec. N. S. 115; *Betagh v. Jordan*, 4 Law Rec. O. S. 38; which, however, were cases under the old practice. In such cases the irregularity would be considered as waived. Plaint irregular if not indorsed.

12. Every writ of summons and plaint shall contain or be endorsed with the name and place of abode of the attorney(v) actually suing out the same, and in case no attorney shall be employed to issue the writ, then it shall contain or be endorsed with a memorandum expressing that the same has been sued out by the plaintiff in person, mentioning the city, town, or parish, and also the name of the street and number (if any) of the house of such plaintiff's residence, and also, in case the said plaintiff shall not reside in the city of *Dublin*, mentioning some place in the said city at which the debt may be paid, and all notices and other proceedings in the cause may be served (w). Writ to be indorsed with name and abode of attorney, or of plaintiff in person. 15 & 16 Vict. c. 76, s. 6.

(v) The object of the indorsement is to give the defendant full information as to the place where he may go for the purpose of settling the action. If the indorsement be omitted, or be defective, the writ will be set aside, or ordered to be amended (Ch. Arch. Pr. 12th Ed. p. 191; *Dempster v. Vernon*, 6 Ir. Jur. N. S. 366); and if amended at the plaintiff's instance, it will have to be re-served (*ibid.*). When sued out by a firm of attorneys, the name of the firm ought to be indorsed (*Eagleheart v. Eyre*, 2 Dowl. 145, per Patteson, J.). Object of the indorsement.

(w) If the residence given be fictitious, the defendant will be allowed to serve any notices in the cause by posting them in the office of the Court and at the place mentioned in the plaint (*Ricky v. Crawford*, Ir. R. 2 C. L. 434). Where a fictitious residence is given.

13. Every attorney whose name shall be mentioned in or endorsed on any writ of summons and plaint issued by authority of this Act shall, on demand in writing made by or on behalf of any defendant, declare forthwith whether such writ has been issued by him or with his authority or privity (x); and if he shall answer in the affirmative, then he shall also, in case the Court or a Judge shall so order, declare in writing, within a time to be allowed by such Court or Judge, the profession, occupation, or quality, and place of abode of the plaintiff(y), on pain of being guilty of a contempt of the Court into which such writ shall be return- Attorney, on demand, to declare whether writ issued by his authority, and to declare name and abode of plaintiff. 15 & 16 Vict. c. 76, s. 7.

15 & 16 Vict.
c. 76, s. 7.

able (s); and if such attorney shall declare that the writ was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed, and all further proceedings taken thereupon, without leave of the Court or a Judge, shall be deemed irregular, and may be set aside accordingly.

Using attorney's name without authority.

(x) Where an attorney's name is used without authority, the proceedings may be set aside, if the Court thinks fit to do so, in place of staying them (*Hopwood v. Adams*, 5 Burr. 2660; *Norton v. Curtis*, 3 Dowl. 245). If, on the other hand, an attorney institutes proceedings without authority, he will be ordered to pay the costs (*French v. French*, 4 Law Rec. N. S. 123; *Doe v. Eyton*, 3 B. & Ad. 785), in which latter case the attorney had innocently acted under a forged power of attorney.

How application is to be made.

(y) An application to the Court for this purpose should be made within a reasonable time. It should appear that the defendant does not know who the plaintiff is, or is not acquainted with the other particulars mentioned in the section; and therefore, in a case where the Court inferred that the defendant was acquainted with the plaintiff's residence, an order was refused (*O'Brien v. Lemass*, 1 Ir. Jur. N. S. 140). See also *Riley v. Beatty*, 6 Ir. L. R. 100. The order will not in general be refused, though it be sought for a collateral purpose, as, for instance, for the purpose of enforcing a cross claim (*Cox v. Bockett*, 18 C. B. N. S. 239). But when the defendant avowed that he sought the information with a view to effect the plaintiff's arrest on a criminal charge, the Court refused an order (*Harris v. Holler*, 19 L. J. Q. B. 62). So also where the application was made after verdict, the Court refused to make the order (*Hooper v. Harcourt*, 1 H. Bl. 534).

(z) Where the plaintiff's attorney disobeyed the order of the Court, on motion for an attachment, he was ordered to pay the costs, and the proceedings were stayed (*Neal v. Holden*, 3 Dowl. 493). A plaintiff wilfully causing his attorney to deliver a false address is guilty of a contempt (*Smith v. Bond*, 13 M. & W. 594). As to the form of an order under this section, see *Malpus v. Mudd*, 3 H. & N. 246.

Duplicates of plaint.

14. One duplicate or more of such summons and plaint shall be sealed with the seal of the said superior Courts by the said Clerk of the Writs, on application of the plaintiff or his attorney (a).

(a) After the original writ is issued a duplicate writ can only be issued by leave of the Court or a Judge.

Inasmuch as the original writ must be produced at the time of service, it will be often convenient to issue duplicate writs in cases where the defendant's residence is unknown, or there are several defendants.

Writs for commencement of actions to be issued in rotation for the several Courts.

15. All writs of summons and plaint for the commencement of actions in the said Courts shall, by the Clerk of the Writs, be entered and appropriated to the several superior Courts of Law in rotation by twenty-fives, that is to say, the

first twenty-five for the Queen's Bench, the second twenty-five for the Common Pleas, and the third twenty-five for the Exchequer, and so on in continuous rotation of twenty-fives for the several Courts, so as to produce and keep up an equal distribution of such writs ; and all subsequent proceedings in any action so commenced shall be had and taken in the Court to which the said writ shall be in the course of rotation appropriated, and shall be the business of the said Court and the offices thereof : provided always, that no objection on the ground of any privilege possessed or claimed by any defendant to be sued in any particular Court shall be valid in any such action.

No objection on ground of privilege to be valid.

16. No writ of summons and plaint issued under the authority of this Act, or copy thereof, shall be treated or considered as invalid on account of any verbal or technical error or omission in the same, or in any endorsement on the same ; and it shall be lawful for the said Superior Courts of Law respectively, or any Judge thereof, to decide and determine, on any application respecting such error or omission, what is a verbal or technical error or omission in any such writ or copy, and to amend or authorize the amendment thereof, or to set aside the same as irregular ; but all errors or omissions which have not a manifest tendency to mislead the opposite party shall in all cases be deemed merely verbal or technical (b),

No writ of summons to be invalid on account of verbal or technical error or omission. 15 & 16 Vict. c. 78, s. 20.

(b) The object of this section is to provide that the proceedings under a writ of summons and plaint shall not be void in case of an error or omission of a verbal or technical nature in the writ or copy served, and to give the Court power to amend the writ and also the copy, if it thinks fit so to do, in place of setting the proceedings aside. Formerly the Court possessed no power of amending a copy, which was the act of the party (*Eccles v. Cole*, 8 M. & W. 537), although it might amend the writ itself.

Object of the section.

Where an error or omission amounts merely to an irregularity, and is not such as to render the writ or the proceedings under it void, the opposite party must take advantage of the irregularity within a reasonable time, and before a fresh step is taken in the action with knowledge of the irregularity (179 G. O., 1854). Thus, in *Woodroffe v. Dimsdale*, 5 Ir. Jur. O. S. 239, the copy of the writ, which was served on the 17th February, omitted the name of the Court, and the defendant having on the 2nd April applied to set the proceedings aside, the Court refused the application.

Irregularity must be taken advantage of within a reasonable time.

As a general rule, however, such an error or omission in the writ or copy is, where advantage is taken of it in proper time, ground for setting the writ aside, unless the Court gives leave to amend, which it generally will do. Thus, where the copy served was not entitled as of any Court, although the

Consequences of an irregularity.

Omission of name of Court.

teste pointed out the Court out of which it issued, the Court required it to be amended, but compelled the defendant to plead within a limited time (*Cunningham v. O'Gorman*, 4 Ir. Jur. N. S. 221); and see, further, as to the omission of the name of the Court in the copy of the writ, *Tuckey v. M'Carthy*, 7 Ir. C. L. R. 289; and as to such an omission in the writ itself, *Stephenson v. Thorne*, 2 D. & L. 230.

Omission of venue.

Where the writ as filed and served contained no venue, the Court allowed the writ to be amended (*Twomey v. Formey*, 7 Ir. Jur. O. S. 138); and see *Hanbury v. Jones*, 15 Ir. C. L. R. 442.

As to an error or omission in the description of the residence or designation of the parties, see sect. 9, *ante*.

Omission in the copy.

Where the copy of a writ served omitted the word "sold," in a count for goods bargained and sold, and the plaintiff served an amended copy, calling on the defendant to plead in two days, after which he marked judgment, the judgment was set aside (*Holdbrooke v. Dymoke*, 1 R. 2 C. L. 674). The proper course would have been to obtain leave to amend the copy under this section.

Omission of date.

Where a plaint omitted in its date the day of the week, leave to amend was given (*Worlington v. Meade*, 6 Ir. Jur. O. S. 246). As to the omission of any date, see *Ball v. Hamlet*, 3 Dowl. 188.

Amending indorsement.

Leave to amend an indorsement, or to indorse any of the matters which should have been indorsed upon the plaint or the copy of it, may also be obtained (*Dempster v. Vernon*, 6 Ir. Jur. N. S. 366).

Costs.

See, further, as to the subject of amendment, sect. 231, *post*.

If the plaintiff applies for leave to amend an error or omission of the description in question, and offers the defendant proper terms, the defendant will not get the costs of opposing the plaintiff's application, nor will he get the costs of a motion to set the writ aside. (*Twomey v. Formey*, 7 Ir. Jur. O. S. 138).

Terms.

The Court, in giving leave to amend, will generally fix the time for pleading; and if the error or omission was such that the defendant could not have been prejudiced, it will compel him to plead within a limited time (*Cunningham v. O'Gorman*, 4 Ir. Jur., N. S. 221). If no time be fixed, see sect. 44, *post*, as to the time within which a defendant must plead after amendment of the writ or the copy of it.

To prevent doubts from abolition of forms of action.

And whereas the disuse of the technical forms of action heretofore used may give rise to doubts respecting the validity of warrants of attorney and other writings wherein reference is made to such forms of action, and also as to the operation of Statutes of Limitations and other Statutes wherein actions are described or referred to by the like technical forms, and it is expedient that such doubts should be precluded by express enactment, be it therefore enacted as follows:

17. Nothing in this Act contained shall interfere with or affect the provisions of any Act relating to the arrest of any defendant on mesne process or before judgment (c).

(c) The statutes relating to arrest upon mesne process are 3 & 4 Vict. c. 105, ss. 1-6; 4 & 5 Vict. c. 17; 11 & 12 Vict. c. 28, s. 15.

Arrest on mesne process.

And see further, upon the subject of arrest upon meane process, the General Orders of 1854, 11-31, and the notes thereto.

18. Warrants of attorney and other legal documents of every kind, wherein reference is made to any particular form of action, may be acted upon and enforced by signing judgment or otherwise, in the form or manner authorized by this Act, instead of the form or manner agreed upon between the parties thereto (d).

Warrants of attorney and other writings to remain in force.

(d) See further, as to warrants of attorney, the General Orders of 1854, 93-96, and the notes thereto.

19. All statutes relating to actions, or the pleadings or other proceedings therein, or preliminary to the bringing of the same, not hereby repealed, or inconsistent with the provisions of this Act, shall apply and be in force with reference to actions brought after the commencement of this Act, notwithstanding that such actions or the causes thereof may be described or expressed therein by reference to any particular form of action hereby abolished, or that some particular form or cause of action be required to be specified or contained in the said pleading or proceeding.

Statutes relating to actions to remain in force.

With respect to the period of limitation within which personal actions shall be brought (e) :

Limitation of action.

20. All actions for rent (f) upon an indenture of demise, all actions upon any bond or other specialty (g), or upon any judgment (h), statute staple, statute merchant, or recognizance, shall be commenced and sued within twenty years after the cause of such actions or suits, or the recovery of such judgment, but not after ; all actions grounded upon any lending or contract, express or implied, without specialty, or upon any award, where the submission is not by specialty, or for any money levied on *feri facias* ; all actions of account or for not accounting, other than for such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants (i) ; all actions for direct injuries to real or personal property ; actions for the taking away, detention, or conversion of property, goods, and chattels ; actions for libel, malicious prosecution and arrest, seduction, criminal conversation ; and actions for all other causes which would heretofore have been brought in the form of action called

Limitation of certain actions.

3 & 4 Wm. 4, c. 27, s. 40 ;
3 & 4 Vict. c. 105, s. 32 ;
7 & 8 Vict. c. 90, s. 39 ;
21 Jac. 1, c. 16, s. 3 ;
3 & 4 Wm. 4, c. 42, s. 3.

trespass on the case, except as hereinafter excepted, shall be commenced and sued within six years after the cause of such actions, but not after; and all actions for assault, menace, battery, wounding, and imprisonment, shall be commenced and sued within four years after the cause of such actions, but not after; and all actions for words, and for penalties (j), damages, or sums of money given to the party grieved, by any Statute now or hereafter to be in force, shall be commenced and sued within two years after the words spoken, or the cause of such action or suit, but not after; and with respect to every cause of action not herein specifically provided for, being the subject matter of a personal action, such actions in respect thereof shall be brought within the same period of limitation now applicable thereto, notwithstanding that such cause of action may be described or expressed in such Statutes by reference to any particular form of action: provided that nothing in this Act contained shall alter the period of limitation of any action given by any Statute where the time for bringing such action is or shall be by any Statute specially limited (k).

(c) A discussion on the periods of limitation applicable to the different species of actions would be out of place in a work like the present, and it is therefore, proposed only to refer to a few points in connexion with the subject. Fuller information can be obtained by reference to Darby and Bosanquet's treatise on the Statutes of Limitations, and the other works upon the subject.

Old Statutes
of limita-
tions.

The old Statutes of limitation applicable to actions were: 10 Charles 1, sess. 2. c. 6, ss. 14, 15, & 17; and 8 Geo. 1, c. 4, ss. 1 & 2.

These sections have been repealed by the present Statute, and in their place the above and following sections have been substituted.

Present
enactments.

The periods of limitation applicable to each description of action is prescribed by the above section of the Act. Sections 21-24 provide for cases where the ordinary periods of limitation are extended in favour of the party. The cases provided for are—1st, where a judgment in favour of the party has been arrested or reversed (sect. 21); 2nd, where the party was under disability at the time of the accrual of the cause of action (sect. 22); and, 3rd, where the cause of action is revived by acknowledgment or part payment (ss. 23, 24). As to preventing the operation of the Statute by the issuing of process, see sect. 28, *post*.

Sections 9-14 of the Mercantile Law Amendment Act, 1856, have modified the law upon the subject in some important respects.

The provisions of the present Act are conversant with *actions* only, and do not apply to any other proceedings. Accordingly, it having been held that a writ of revivor is not an "action," it follows that the proceedings under it are not governed by the present Act. See *post*, note (h).

The time of limitation begins to run from the period when the action might first have been brought. Accordingly, in an action against a solicitor

Mercantile
Law Amend-
ment Act.

Apply to
actions only.

When time
begins to
run.

for negligence in lending money upon an insufficient title, time begins to run from the date of the lending, and not from the time that the loss occurs or is discovered (*Howell v. Jones*, 5 B. & C. 259; *Crean v. Bourke*, 5 Ir. Jur. O. S. 80). And it is no answer to a defence of the Statute that the cause of action was fraudulently concealed from the plaintiff by the defendant (*Hunter v. Gibbons*, 1 H. & N. 459). But where an act is not injurious in itself, but may become so—as where a person excavates his own land in a manner which may cause subsidence in the land of his neighbour—time does not begin to run until the damage accrues (*Bonomi v. Backhouse*, 9 H. of L. C. 503). And if, in such a case, the act causes continued damage, the right of action is also continuing (*Whitehouse v. Fellowes*, 10 C. B. N. S. 765). In the case of a bond or covenant to do various things, the Statute begins to run from the date of each breach in respect of that breach; but every new breach gives a new cause of action (*Sanders v. Coward*, 15 M. & W. 48).

Bond.

When a promissory note is made payable on demand, the Statute of Limitation runs from the time of delivery (*Dick v. Gourney*, 1r. Term Rep. 242; *Norton v. Ellam*, 2 M. & W. 461). In an action for costs the Statute does not in general begin to run until the suit, in respect of which they were incurred, is terminated (*Martindale v. Falkner*, 2 C. B. 706).

Costs.

(f) The provisions of the 3 & 4 Wm. 4, c. 27, s. 2, do not apply to rent reserved upon an indenture of demise, and accordingly though no rent has been paid under a lease for twenty years, the accruing gales and twenty years' arrears may be recovered by action, or an ejectment for non-payment of rent may be brought (*Parke v. M'Loughlin*, 3 Ir. Jur., O. S., 405). Where an ejectment for non-payment of rent is brought (the lease being under seal) it is doubtful whether the proceedings are subject to the provisions of the present section, or of 3 & 4 Wm. 4, c. 27, s. 42; in other words, whether six years' or twenty years' arrears of rent are recoverable in the action, and whether the action is maintainable in respect of arrears which accrued due more than six years before the bringing of the action (*Percival v. Dunne*, 9 Ir. C. L. R. 422). But where the plaintiff in such an action was an infant, he was held entitled to recover nineteen and a-half years' arrears (*Nixon v. Darley*, 1r. R. 2 C. L. 467).

Actions for rent.

Ejectment for non-payment of rent.

(g) Actions for debt on a Statute (other than penal actions) are considered as founded on a specialty within the meaning of this enactment, e. g. actions for calls against a shareholder in a railway company (*Cork, &c. Railway Co. v. Goode*, 13 C. B. 826).

Actions for debt under a Statute.

(h) A writ of revivor has been held not to be an action upon a judgment within the meaning of the section (*Johnson v. Bell*, 6 Ir. C. L. R. 526; *Wall v. Walsh*, 1r. R. 4 C. L. 103). It follows, therefore, that the period within which it may be issued is regulated by the 3 & 4 Wm. 4, c. 27, s. 40, by which it is enacted that "no action, or suit, or other proceeding, shall be brought to recover any sum of money secured by any . . . judgment . . . but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or

Writ of Revivor.

Time within which it must be issued.

suit, or proceeding shall be brought, but within twenty years after such payment, or acknowledgment, or the last of such payments or acknowledgments, if more than one was given."

Where judgment entered on a bond and warrant.

It will be observed that the period fixed by this section as the starting point from which time begins to run is different from the time fixed in the Act we are considering, and that the manner in which the acknowledgment spoken of is to be made, is different from that prescribed in section 23 *post*. Accordingly, where judgment is entered on a bond, conditioned for payment of money upon the happening of a future event, time does not begin to run until the happening of the event (*Gilman v. Chute*, 11 Ir. L. R. 442; *Barber v. Shore*, 1 Jebb & Sym. 610). So, also payment by one of the parties responsible for payment of the sum secured, keeps the judgment alive as against all (*Wall v. Walsh*, 1r. R. 4 C. L. 103), in which case separate judgments had been entered on a joint and several bond; although in the case of an "action," the result would be different by the express provisions of the Mercantile Law Amendment Act, sect. 14; and see *Martin v. McCausland*, 3 Ir. L. R. 113.

Where judgment is revived.

When a judgment is revived the plaintiff thereby acquires a new right, and time begins to run afresh (*Farrell v. Gleeson*, 11 Cl. & F. 702). But if a second writ of revivor be issued, it should be founded on the judgment of revival, and not on the original judgment (*Farran v. Beresford*, 10 Cl. & F. 319).

Where re-registered.

The re-registration of a judgment does not operate as a revival (*Pearson v. McCraith*, Hay. and Jon. 372).

Actions for not accounting.

(i) By sect. 9 of the Mercantile Law Amendment Act, this exception has been repealed, and such actions must be brought within six years.

Actions for penalties.

(j) The present section provides only for cases where the penalty is by the Statute given to the party grieved. Where an action is brought by an informer, the Statute, 2 Geo. I., c. 20, ss. 3 & 4 (1r.), provides that the action must be brought within one year after the offence committed, and it has been held that the Statute applies as well to actions by an informer who sues *pro seipso* as to actions where he sues *qui tam* (*Dyer v. Best*, L. R. 1 Ex. 152; *Barrett v. Johnson*, 2 Jones, 197).

Special periods of limitation.

(k) The 5 & 6 Vict. c. 97, s. 5, provides a uniform period of limitation of two years for cases where special periods of limitations were fixed by Statutes of a local or personal nature. As to the construction of this Act, see *Browne v. City of Dublin Steam Packet Co.*, 7 Ir. Jur. O. S. 53.

Special periods of limitation are also provided in other cases by particular Acts. Thus actions against justices for anything done in the execution of their office, must be brought within six months (12 Vict. c. 16, s. 8). Actions under Lord Campbell's Act (9 & 10 Vict. c. 93) must be brought within twelve months after the death. Actions by executors, &c., for injury to the testator's real estate during his lifetime must be brought within a year after the death (3 & 4 Vict. c. 105, s. 31). By the same section, actions against executors for any wrong committed by a testator, in relation to the real or personal property of the plaintiff, must be brought within six months after probate; and actions against a person for anything done in pursuance of the Criminal Law Consolidation Acts (24 & 25 Vict. c. 96, 97, & 99), must be commenced within six months after the act complained of.

Limitation after judgment.

21. If in any of the said actions judgment be given for the plaintiff, and the same be reversed by error, or a

verdict pass, or, upon judgment by default, damages be assessed for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff that he take nothing by his plaint, in all such cases the party, plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit from time to time within the period of limitation hereinbefore provided for in such action, or within a year after such judgment reversed or judgment given against the plaintiff, and not after.

ment arrested or reversed.
21 Jac. 1.
c. 16, s. 4.

22. If any person that is or shall be entitled to any such action is or shall be at the time of any such cause of action accrued^(l) within the age of twenty-one years, a married woman, of unsound mind, or beyond the seas^(m), then such person shall be at liberty to bring the same action, so as he commence the same within such time after the cessation of such disability or his return from beyond the seas, as other persons having no such impediment should, according to the provisions of this Act, have done; and if any person or persons against whom there shall be any such cause of action is or shall be at the time such cause of action accrued beyond the seas⁽ⁿ⁾, then the person entitled to any such cause of action shall be at liberty to bring the same against such person, within such time as is before limited, after the return of such person from beyond the seas..

Remedy for disabilities.
21 Jac. 1.
c. 16, s. 7.
4 Anne, c. 16, s. 19.
11 & 4 Wm. 4, c. 42, s. 4.

(l) This section extends the time within which a plaintiff may sue in cases where he was under disability at the time of the accruing of the cause of action. The provisions of the section have been modified in some respects by the sections of the Mercantile Law Amendment Act referred to below.

When time has once begun to run no subsequent disability will suspend the operation of the Statute (*Smith v. Hill*, 1 Wils. 134). In cases where the plaintiff relies upon any of the disabilities enumerated as taking his case out of the Statute of Limitations he must reply it, if the Statute be pleaded.

Disabilities where time has begun to run.

If an action be brought by, or against an executor or administrator, where the cause of action did not accrue during the life-time of the testator, or intestate, it has been held that the Statute does not begin to run until the granting of probate or letters of administration, on the principle that a cause of action does not exist, unless there be a person in existence capable of suing, and of being sued (*Murray v. East India Company*, 5 B. & Ald. 204; *Douglas v. Forrest*, 4 Bing. 686).

Extension of time in actions by or against an executor.

(m) By 19 & 20 Vict. c. 97, s. 10, it is no longer an answer to the Statute of Limitations that the plaintiff, or some or one of the plain-

Where plaintiff beyond seas.

tiff's was beyond the seas at the time of the accrual of the cause of action.

It has been held that this provision is retrospective (*Pardo v. Bingham*, L. R. 4 Ch. Ap. 735).

Where one of several co-debtors is beyond seas.

(n) By the 19 & 20 Vict. c. 97, s. 11, it is provided that in the case of joint debtors, although one of the co-debtors be beyond the seas at the time of the accrual of the cause of action, the plaintiff shall not by reason thereof be entitled to any further time to bring his action against the other co-debtor or co-debtors, who shall not be beyond the seas at the time of the accrual of the cause of action. And in such a case it is further provided that the plaintiff shall not be barred from commencing an action against the co-debtor who was absent, after his return, by reason only that judgment has already been recovered against the other co-debtor or co-debtors.

After acknowledgment or part payment on account of specialty, judgment, recognizance, &c.
3 & 4 Wm. 4, c. 42, s. 5.

23. If any acknowledgment (o) shall have been or shall be made, either by writing signed by the party liable by virtue of any indenture, specialty, judgment, statute staple, or statute merchant, or recognizance, or his agent (p), or by part payment or part satisfaction on account of any principal or interest being then due thereon (q), it shall be lawful for the person entitled to bring his action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment by writing, or part payment or part satisfaction as aforesaid, or in case the person entitled shall at the time of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgment be at the time of making the same beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond the seas, as the case may be; and the plaintiff in any such action on any indenture, specialty, judgment, statute staple, or statute merchant, or recognizance, may rely on such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute (r).

Acknowledgment or payment in actions on a specialty.

(o) This and the following section deal with cases where the period of limitation is deferred in consequence of an acknowledgment made by writing or payment in the manner provided. The present section provides expressly that the period shall be deferred in actions upon an indenture, specialty, judgment, statute staple, or statute merchant, or recognizance, when an acknowledgment is so made. The acknowledgment must be in writing and signed by the party or his agent. The liability of the party can, however, be renewed under this section only in cases of money demands, and not where the liability has arisen in respect of other acts or omissions (*Blair v. Ormond*, 19 Q. B. 423). The acknowledgment or payment may be made even although twenty years have passed since the accruing of the cause of action (*Harty v. Davis*, 13 Ir. L. R. 23).

Acknowledgment must be in writing. Only applicable in cases of a money demand.

(p) The acknowledgment under this section may be made, it would seem, to a stranger (*Moodie v. Bannister*, 4 Drewry, 432), and it has been held that the setting forth a judgment debt in an insolvent schedule is a sufficient acknowledgment within the 3 & 4 Vict., c. 27, s. 40 (*M'Carthy v. O'Brien*, 2 Ir. L. R. 67; *Dugdale v. Vize*, 5 Ir. L. R. 586). The report of a Master in Chancery finding a certain sum due is not an acknowledgment within the meaning of the Statute (*Hill v. Stawell*, 2 Ir. L. R. 302).

To whom it may be made.

(q) A payment made in the Landed Estates Court out of the estate of the debtor will take a case out of the Statute (*Cronin v. Dennehy*, Ir. R. 3 C. L. 289). So also a payment made by a receiver appointed by the Court of Chancery over the debtor's estate (*Chinnery v. Evans*, 11 H. of L. C. 115).

Payment.
How it may be made.

Where there are several debts due by the debtor, some of which are and some are not barred by the Statute, a payment made generally will operate to renew the debtor's liability upon the debts not barred, but it will not revive those which have been already barred (*Nash v. Hodgson*, 6 D. M. & G. 474). Payment by one co-debtor will not operate to deprive the other co-debtor of the benefit of the Statute (19 & 20 Vict., c. 97, s. 14); and it has been held that this section is not retrospective (*Jackson v. Woolley*, 27 L. J., Q. B. 448).

Where several debts.

(r) An acknowledgment or payment under this section must be replied (*Kempe v. Gibbon*, 9 Q. B. 609); *secus* in cases falling under the next section.

How pleaded

24. In actions grounded upon any simple contract no acknowledgment or promise shall be deemed sufficient evidence of a new or continuing contract (s), whereby to take any case out of the operation of the provisions of this Act in relation to the limitation of actions, or to deprive any party of the benefit thereof, unless such acknowledgment or promise (t) shall be made or contained by or in some writing to be signed by the party chargeable thereby (u); and where there shall be two or more joint contractors, or executors, or administrators of any contractor, no such joint contractor, executor, or administrator, shall lose the benefit of this Act, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: provided always that nothing herein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whomsoever (v).

After acknowledgment or part payment in respect of liabilities on simple contract.
9 Geo. 4. c. 14, s. 1.

(s) Unlike the previous section, the present one does not expressly provide that an acknowledgment shall renew a liability on a simple contract. It merely provides that the acknowledgment or promise, when not evidenced by payment, must be in writing. This difference between the two sections arises from the fact that, where the liability arises on a simple contract, the acknowledgment, or promise, or payment is, *per se*, and independent of the provisions of the Act, a new cause of action, which it cannot be where the

Acknowledgment or payment in actions of simple contract.

original liability arises from a specialty. For the same reason it is unnecessary, in cases within the present section, to reply the acknowledgment or payment, as the plaintiff by taking issue asserts in effect that the cause of action did accrue within the prescribed period (*Tanner v. Smart*, 6 B. & C. 603, 606). So also the plaintiff may, if he wish, declare specially upon the defendant's new promise, as in *Lechmere v. Fletcher*, 1 C. & M. 623. And in *Holmes v. Smith*, 7 Ir. C. L. R. 461, it seems to have been considered that, in order to entitle a personal representative to rely upon an acknowledgment made to himself by the debtor, a count is required stating the existence of the debt at the time of the death of the testator, and in consideration thereof a promise by the defendant to pay.

The renewal of liability by acknowledgment is confined to cases of debts acknowledged, and does not arise where the breach of contract does not result in a debt (*Whitehead v. Howard*, 2 Br. & B. 372).

(e) The acknowledgment or promise must be made to the creditor, as otherwise no promise could be inferred. (*Godwin v. Culley*, 4 H. & N. 373, 380, *per* Bramwell, B.). The new promise to pay may be either absolute, or it may be conditional; in which case the plaintiff cannot sue till the condition has been performed (*Tanner v. Smart*, 6 B. & C. 603). Or, although there has been no promise, yet an acknowledgment of the debt being due may be given, from which the law will imply a promise. See, as to when the law will imply such a promise, *Cassidy v. Firman*, 1r. R. 1 C. L. 8, and the cases referred to there. If a defendant acknowledges the debt, but expresses his intention of not paying, no promise can of course be implied. A requisition to tax costs, with an undertaking to pay the amount, when taxed, is a sufficient acknowledgment (*Archer v. Leonard*, 15 Ir. Ch. R. 267).

(*) Under the section as it stood, an acknowledgment signed by the agent of the debtor was not sufficient to revive a debt (*Hyde v. Johnson*, 2 Bing. N. C. 776). By sect. 13 of the 19 & 20 Vict. c. 97, however, it is now provided that an acknowledgment or promise made in writing by an agent of the debtor shall be sufficient. See, as to the construction of this section, *Archer v. Leonard*, *ubi supra*; *Leland v. Murphy*, 16 Ir. Ch. R. 500.

(v) In consequence of the concluding proviso of the section, it followed that a payment by one of two co-debtors operated to revive the remedy as against the other; but now, by sect. 14 of the 19 & 20 Vict. c. 97, it is provided that one co-debtor shall not lose the benefit of the Statute by reason of a payment by another co-debtor.

It is not necessary that the payment should be actually made in money. It may be made in goods (*Hooper v. Stephens*, 4 A. & E. 71). In *Maber v. Maber*, L. R. 2 Ex. 153, it was held that where a debtor put his hand in his pocket, as if to get out the money to make a payment on account, but was stopped by the plaintiff, who wrote a receipt for the amount about to be paid, and gave it to the debtor's wife, saying that he would make her a present of the money, the debt was taken out of the Statute of Limitations.

Endorsement of payment by creditor not to take case out of Statute.

25. No endorsement or memorandum of any payment written or made upon any promissory note, bill of exchange or other writing (w), by or on behalf (x) of the party to whom such payment shall be made, shall be deemed sufficient

proof of such payment, so as to take the case out of the operation of the provisions of this Act in relation to the limitation of actions. 9 Geo. 4, c. 14, s. 3.

(w) The "other writing" spoken of here means a writing containing the contract by which the party is to be bound; and the words do not apply therefore to a memorandum made elsewhere (*Bradley v. James*, 13 C. B. 822). "Other writing."

(x) When the indorsement was made by a person at the request of both parties, it was held by Pennefather, B., that it was sufficient evidence to take the case out of the Statute (*Chatterton v. M'Alister*, Ir. Cir. Rep. 46). By whom made.

26. This Act shall be deemed and taken to apply to the case of any debt alleged by way of set-off on the part of any defendant. As to debts alleged by way of set-off 9 Geo. c. 14, s. 4.

27. No memorandum or other writing made necessary by this Act shall be deemed to be an agreement within the meaning of any Statute relating to the duties on stamps. Memoranda not to require stamps 9 Geo. c. 14, s. 8.

With respect to the duration and continuance of writs to prevent the operation of any Statute of Limitation : Continuance of writs.

28. No writ of summons and plaint shall be in force for the purpose of service for more than six calendar months from the day of the date thereof, including the day of such date (y); but if any defendant therein named shall not have been served therewith, the original or duplicate writ of summons and plaint may be renewed at any time before its expiration for six calendar months from the date of such renewal (z), and so from time to time during the currency of the renewed writ, by being marked with the common seal of the Superior Courts, with a memorandum, signed or initialed by the officer, of the date of the day, month, and year of such renewal: provided always that no writ of summons and plaint so renewed shall be available to prevent the operation of any Statute whereby the time for the commencement of the action may be limited, unless such renewal shall be had by leave of the Court or a Judge on an affidavit to satisfy the said Court or a Judge that reasonable diligence was used to effect service thereof (a). Renewal of writs of summons to save the Statute of Limitation and for other purposes 15 & 16 Vict. c. 76, s. 11.

(y) The day of the date of the writ is to be reckoned in the six months during which it remains in force; and, therefore, a writ issued on the 15th June is not in force on the 15th December following, and cannot be renewed upon that day (*O'Leary v. Loftus*, 10 Ir. Jur. N. S. 133). How time computed.

When last day falls on a holiday.

Where writ renewed.

Renewing writ to prevent operation of Statutes of limitation where several defendants.

Renewal of writs issued before this act.
15 & 16 Vict.
c. 76, s. 12.

Production of renewed writ evidence of commence-

When the last day of the six months falls upon a Sunday or holiday, the following day is not to be reckoned in the period provided by the Act, notwithstanding the 6th G. O. of 1854 (*Evans v. Jones*, 2 B. & S. 45).

(z) If a writ has not been renewed within the prescribed period, and there has been no default on the part of the officer of the Court, the Court cannot order a writ to be renewed *nunc pro tunc* (*Nazer v. Wade*, 1 B. & S. 728). The day upon which a writ is renewed is to be reckoned in the period of six months during which it remains in force (*Anonymous*, 1 H. & C. 664).

(a) If there be several defendants, and any one of them cannot be served, although reasonable diligence be used for that purpose, the Court will make an order for the renewal of the writ, although service might have been effected on the other defendants, but was not (*Dickson v. Capes*, 11 Ir. C. L. R. 334); and the renewal will operate to prevent the Statute running in favour of the others.

29. Where any writ of summons shall have been issued in any action before and shall be in force at the commencement of this Act, such writ may, at any time before the expiration thereof, be renewed under the provisions of and in the manner directed by this Act; and where any writ of summons, or *capias ad respondendum* issued in continuation of a preceding writ, according to the provisions of an Act passed in a session of Parliament holden in the third and fourth years of the reign of Her Majesty the Queen, shall be in force and unexpired, or where one calendar month next after the expiration thereof shall not have elapsed at the commencement of this Act, such continuing writ may, without being returned *non est inventus*, or entered of record, according to the provisions of the said Act of Her Majesty the Queen, be filed in the proper office of the Court within one calendar month next after the expiration of such writ, or within twenty days after the commencement of this Act; and the original writ of summons or *capias* in such action may thereupon, but within the same period of one month next after the expiration of the continuing writ, or within twenty days after the commencement of this Act, be renewed, under the provisions of and in the manner directed by this act; and every such writ shall after such renewal have the same duration and effect for all purposes, and shall, if necessary, be subsequently renewed, in the same manner as if it had originally issued under the authority of this Act.

30. The production of the writ of summons and plaint, purporting to be marked with the common seal of the said Superior Courts, and initialed by the said officer, showing

the same to have been renewed according to this act, shall be sufficient evidence of its having been so renewed, and of the commencement of the action as of the first date of such renewed writ, for all purposes whatsoever.

ment of action, 15 & 16 Vict. c. 76, s. 13.

With respect to the service of such writs of summons and plaintiff (b):

Service of writs.

31. The writ of summons and plaintiff may be served in any place or county in which the defendant may be found within the jurisdiction of the Court, and not out of said jurisdiction, unless by an order of the Court or Judge (c); and the person serving the same is hereby required, on the day of such service, or at latest on the day next after, to endorse on the writ the place and day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty, in case of no appearance and defence, to proceed under this Act (d); and every affidavit of service of such writ shall mention the day on which such endorsement was made.

Writs may be served in any county.

15 & 16 Vict. c. 76, ss. 14, 15.

(b) This and the next four sections provide for the service of the writ of summons and plaintiff in ordinary cases. The service must, where reasonably practicable, be upon the defendant personally (*vide* p. 26, note (e)). Where personal service has not been effected, notwithstanding that due and reasonable diligence has been exercised, service may be effected by serving some member of the defendant's family or household at his residence, provided he be within the jurisdiction (*vide* p. 28, notes (f), (h), *post*). When service cannot be effected in either of the two modes mentioned, either in consequence of the defendant avoiding service, or being out of the jurisdiction, service must be substituted under the 34th section; in which case it will be necessary to apply to the Court or a Judge.

How service to be effected in general.

When service has been effected, the person who effects it must endorse the particulars of service upon the writ (*vide* note (d), *infra*); and where it becomes necessary to mark a judgment by default, an affidavit of service has to be made (sect. 35). Sect. 33 provides for service upon a corporation.

Where the action is one of replevin, the manner in which service is to be effected is provided for by sect. 228, *post*; and in actions of ejectment by sect. 197, *post*, and sects. 55, 56, 57, and 74 of 23 & 24 Vict. c. 154.

In replevin and ejectment.

(c) "Unless by an order of the Court or Judge." This refers to cases where leave is obtained to substitute service on a defendant out of the jurisdiction under the 34th section of the Act.

(d) The provisions of the section as to the indorsement upon the writ of the place and day of service, are mandatory, and not directory; and in case the prescribed indorsement be not made within the time mentioned, the Court has no jurisdiction to supply the omission (*Studdert v. Leary*, 7 Ir. C. L. R. 543; *Vandeleur v. Smith*, 3 Ir. C. L. R. 86). The provisions of the Act, moreover, apply to actions of ejectment as well as to ordinary actions (*Vandeleur v. Smith*, *ubi supra*), and to cases where the service is substituted, as well as to cases where it is personal (*Rogers v. Burke*, 9 Ir. C. L. R. App. 34).

Indorsement of service.

Cannot be dispensed with.

Accordingly, where there was an omission to state the day of the week of the service upon one of the defendants, although the day of the month was correctly stated, the Court set aside a judgment which had been marked against all the defendants (*Mulholland v. M'Court*, 11 Ir. Jur. N. S. 13).

Or amended. And in *Knaresborough v. Edmundson*, 1 Ir. L. T. 278, the Court refused to allow an amendment in the indorsement.

Exceptions. Where, however, the original writ had been taken from the process server with violence by the defendant, the Court gave leave to issue a duplicate writ, and granted a conditional order to mark judgment, although no indorsement had been made (*Brunton v. Doyle*, Ir. R. 2 C. L. 86).

Leave, too, has been given to amend the indorsement where the day of the week was through mistake incorrectly stated (*Kyne v. Murphy*, Ir. R. 2 C. L. 34). And see *Galway Commissioners v. Doyle*, 8 Ir. Jur. N. S. 95; *Darcy v. Wynne*, 7 Ir. Jur. O. S. 160; *Goff v. Fenlan*, 6 Ir. Jur. N. S. 41.

32. Service of any writ of summons and plaint on the defendant shall be effected either by delivery of a copy of such writ to the defendant in person (e), if it be reasonably practicable; and in other cases, and where it shall appear by the affidavit of service hereinafter mentioned that such defendant is personally within the jurisdiction (f), and that due and reasonable diligence (g) has been exercised in endeavouring to effect such personal service, and without effect, in such case it shall be sufficient to make service of such writ by leaving such copy at the defendant's house or place of residence, or at his office, warehouse, counting-house, shop, factory, or place of business, with the wife, child, father, mother, brother, or sister of the defendant, or with any servant or clerk of the defendant (the person with whom such copy shall be left being of the age of sixteen years or upwards), and showing to such person the original, or duplicate original, of such summons and plaint (h).

Personal service.

(e) The Statute requires the service of the writ to be personal whenever practicable. It should be served by a person who knows the defendant, and can swear to his identity. It may be served late at night (*Priddle v. Cooper*, 1 Bing. 66). But it cannot be served on a Sunday; and such a service would be wholly void (*Taylor v. Phillips*, 3 East, 155).

When to be effected.

How effected.

In cases of personal service it is not necessary to leave the copy in the actual corporal possession of the person served; for if, after informing the defendant of the nature of the process and tendering the copy, he refuses to receive it, the placing it on his person or throwing it down in his presence will be sufficient service (*Bell v. Vincent*, 7 D. & R. 233). So also the service is good, if the copy and original be shown to the defendant through the window, and the copy left on the window stool (*Hunt v. Egan*, 1 Leg. Rep. 174); with which compare *Christmas v. Eicke*, 6 D. & L. 156.

On husband and wife.

In actions against husband and wife, service on the husband has been held to be sufficient. (*Buncombe v. Love, Barnes*, 406, 412).

On prisoner.

The writ may be personally served on a prisoner (*Cusby v. Robinson*,

6 p. 5
s. 15
Service of
summons in
ordinary
cases.

5 Ir. Jur. N. S. 37). And though orders for substitution of service on the governor of the prison have been made (*Maguire v. Gardiner*, 4 Ir. L. R. 310), yet such an order would scarcely be granted now; and it would be a contempt of Court on the part of the governor not to bring the defendant forward for the purpose of service (*Danson v. Le Capelaine*, 21 L. J. Ex. 219).

An undertaking by an attorney to appear and defend, or give a consent for judgment, will be enforced by attachment (Ch. Arch. 12th ed. p. 200); or an order will be made that the plaintiff be at liberty to mark judgment after a limited time, unless cause be shown (*Butler v. Anderson*, 2 Ir. Jur. N. S. 332; *Hall v. Rynd*, 8 Ir. C. L. R. App. 4).

Undertaking to appear.

In cases where the attorney is not authorized to give the undertaking, the judgment will of course be set aside (*Doyle v. Roche*, 1 Ir. Jur. N. S. 153; *Synnott v. Green*, 7 Ir. Jur. N. S. 278).

When a plaintiff effects, or attempts to effect service under this section, his proceedings are liable to be set aside, if he be guilty of any irregularity. The irregularity may be in the writ itself, or in the copy of it served. (See *ante*, sects. 9, 10, 11, 12, and 16). If the irregularity be in the writ, the application will be to set aside the writ and all the proceedings under it; if in the copy only, the application will be to set aside the service (*Hall v. Redington*, 5 M. & W. 605). And in *Holdbrook v. Dymoke*, 1r. R. 2 C. L. 674, where the copy served was irregular, the Court set aside a judgment marked. The irregularity may also arise from the manner of the service, or the proceedings attending it, as in *Mulholland v. McCourt*, 11 Ir. Jur. N. S. 13, where the indorsement was defective. As to waiving an irregularity in the service, see *Holmes v. Russell*, 9 Dowl. 487; *Rawes v. Knight*, 1 Bing. 132.

Irregularity in service.

How taken advantage of.

Where judgment is marked against a defendant who has not been served with the writ, he may apply to the Court to set aside the judgment; but the cases are conflicting as to the terms on which relief will be given. In *Tisdall v. Humphreys*, 1r. R. 1 C. L. 1, where it appeared that the defendant was not within the jurisdiction at the time of the alleged service, or from that time till judgment, the Court set aside the judgment, although there was no denial that the process had come to the defendant's hands, and no affidavit of merits; and see *Flower v. Allan*, 2 H. & C. 688.

Setting aside judgment where no service.

Where defendant not within jurisdiction.

Where the defendant is within the jurisdiction, it has been frequently held that relief will not be granted if he allows an unreasonable time to elapse after knowledge of the action without applying, as the proceedings in such a case are irregular only, and not void (*Lewis v. Berry*, 6 Ir. L. R. 45; *Lewis v. Henry*, 6 Ir. L. R. 218; *Cowan v. Darcy*, 2 Ir. Jur. O. S. 315; *Holmes v. Russell*, 9 Dowl. 487; *Williams v. Pigott*, 1 M. & W. 574). And the affidavit should, therefore, state how defendant first became aware of the writ. Assuming that the defendant applies within a proper time, the next question is, what evidence the Court will require before it will set the judgment aside. The affidavits must be clear and free from all ambiguity (*De Montmorency v. Pope*, 2 Ir. Jur. O. S. 213); and in many cases the defendant has been put under terms to prosecute the process server (*O'Farrell v. Burke*, 1r. R. 2 C. L. 82; *Mitchell v. Smith*, 6 Ir. Jur. N. S. 373); in which case the Court refused to grant the defendant the costs of the prosecution. Where, however, the process server is dead, or it appears he must have been mistaken, relief will be granted, if the Court is satisfied that service was not effected (*Henessy v. Wall*, 6 Ir. L. R. 205); and see *Mosely v. Blake*, 28 L. J. Ex. 35; *Fallon v. Cox, Cooke & Alc.* 24; in which latter case the process server had been acquitted.

Where the writ has come to the knowledge of the defendant.

Prosecuting the process server.

Affidavit of merits.

When the Court is satisfied that service has not been effected, and the defendant has applied in proper time, the judgment will be set aside without an affidavit of merits (*Martin v. Williams*, Ir. R. 3 C. L. 5), although formerly such an affidavit was frequently required.

Defendant must be within the jurisdiction.

(f) In order that the plaintiff may be able to proceed under this section, it is absolutely necessary that the defendant should be within the jurisdiction (*Tisdall v. Humphreys*, Ir. R. 1 C. L. 1), referred to above.

Due and reasonable diligence.

(g) The question of when due and reasonable diligence has been exercised in endeavouring to effect personal service, is one which depends upon the circumstances of each case. Formerly it was considered necessary to make three calls on different days at the defendant's residence. It is not, however, absolutely necessary that the process server should adopt this course (See *Tomlinson v. Goatly*, L. R. 1 C. P. 230).

Service on servant of defendant.

(h) Where the service was effected upon a servant of the defendant, near his dwelling-house, it was held to be insufficient (*Grady v. Kearney*, 8 Ir. C. L. R. App. 44).

Service on Corporations.
15 & 16 Vict.
c. 76, s. 16.

33. Service of any such writ of summons and plaint issued against a corporation aggregate (i) may be effected either by delivery of a copy of such writ to the mayor or other head officer in person, or to the town clerk, treasurer, or secretary of such corporation (j); and service of any such writ issued against the inhabitants of a barony, half barony, or other like district, may be effected by delivery of such copy to the acting high constable thereof, or any one of the acting high constables thereof, in person; and service of any such writ issued against the inhabitants of any county or any city or town, or the inhabitants of any franchise, liberty, city, town, or place, not being part of a barony or other like district, may be effected by delivery of a copy thereof to some peace officer or other known and responsible officer thereof, in person; and if any such defendants shall not appear and take defence according to the exigency of such writ, in due time after such service thereof, upon affidavit made as hereinafter provided of such personal service of such writ, and of the publication of the notice hereinafter provided, it shall be lawful for the plaintiff to proceed thereon as is hereinafter provided: provided always, that in all such cases a sufficient notice of the issuing of the writ shall be given in the *Dublin Gazette*, and in one of the local newspapers of the county, city, or district, in which the defendant or defendants, or the officer or agent to be served, shall reside, the days for filing an appearance and defence to run in such cases from the day of the publication of such notice in the *Gazette* or newspaper, whichever shall be the latest.

(i) This section only applies to cases where the company is within the jurisdiction. Where the company is to be considered as residing without the jurisdiction, the service will have to be effected under the 34th section, and, unless the order directs it, there will be no necessity to advertise in the *Gazette* (*Mape v. London & N. W. Rly. Co.*, 1 R. 1 C. L. 563). As to where a Corporation is to be considered as residing, see sect. 9, *ante*, note (j).

Section applies only where Corporation within jurisdiction.

The Companies' Clauses Consolidation Act, 8 Vict. c. 16, sect. 135, provided that service of a writ upon a Railway Company should be effected by serving the secretary; but this provision has been held to be repealed by the above section. (*McNamara v. Waterford & Limerick Rly. Co.*, 1 Ir. Jur. N. S. 125; *Moore v. Belfast and Ballymena Rly. Co.*, 6 Ir. C. L. R. 441). In the former case, however, a judgment having been marked, the Court refused to set it aside in consequence of the defendants' delay.

Service on Railway Companies.

Section 62 of the Companies' Act, 1862, 25 & 26 Vict. c. 89, does not apply to the service of a writ of summons and plaint. The writ must, therefore, be served upon a Joint Stock Company, incorporated under that Act, in the manner directed by the present section.

On Joint Stock Company.

If a Company be dissolved, service cannot be substituted by serving the ex-secretary, or other officer (*Fayle v. Kingstown Water Works Co.*, 7 Ir. Jur. N. S. 397; S. C. 14 Ir. C. L. R. App. 10).

Where Company dissolved.

(j) Service on a director of a Company is not equivalent to service on the Secretary (*Towne v. Limerick Steam Ship Company*, 5 C. B., N. S., 730).

The proper mode of serving the Guardians of a Poor Law Union is by serving the treasurer and the clerk, and publishing (*White v. Adair*, 3 Ir. C. L. R. 109).

Service on Poor Law Guardians.

34. In case it shall be made to appear by affidavit, to the satisfaction of the Court in which the action is attached, or, in vacation, of any Judge of any of the said Courts, that any defendant in any summons and plaint, the cause of action in respect of which the same shall have issued having arisen within the jurisdiction of the Court (l), has not been served with the writ of summons and plaint in the manner hereinbefore prescribed, and has not, according to the exigency thereof, appeared and taken defence to the action, and that due and proper means (m) were used to serve such writ in the manner aforesaid, or that such defendant is out of the jurisdiction of the Court (n), and can be properly served through or upon any agent or representative, or any manager of the real or personal estate of such defendant within such jurisdiction (o), or has removed to avoid service, or on any other good and sufficient grounds, it shall be lawful, upon an application made at any time while the said writ shall be in force, for such Court or Judge to authorize such substitution of service through the Post Office, or in such manner and with such extension of time for service and defence as to

Courts may direct substitution of service.

them or him shall seem fit (*p*), and the taxing officer shall allow reasonable costs (*pp*) on such proceedings for substituting service or effecting such service as the Court shall have directed or deemed good; and in default of an appearance and defence by such defendant in due time it shall be lawful for the plaintiff to proceed thereon as is herein-after provided.

Substitution of service.

(*k*) When service of the writ cannot be effected in the manner prescribed by the previous sections the plaintiff may apply to the Court or a Judge for an order to substitute service under this section; and in cases where the defendant is out of the jurisdiction of the Court, it will be observed that the plaintiff has no other mode of proceeding, as he cannot serve the writ personally out of the jurisdiction, without an order of the Court (sect. 31); and as the Court has no power (in actions other than actions of ejectment) to authorize service out of the jurisdiction except under this section (*Dickson v. Capes*, 11 Ir. C. L. R. 345).

In actions of Ejectment.

In actions of ejectment the power of the Court to direct a substituted service is not derived under this section, but under section 197 of the Act, post, and sections 56, 57, and 74, of the Landlord and Tenant Act, 1860 (*Poole v. Griffiths*, 14 Ir. C. L. R. App. 20).

Cases where substitution may be obtained.

The cases in which an order to substitute service can be obtained under this section may be divided into two classes: 1. Where the defendant is within the jurisdiction; 2. Where he is out of the jurisdiction. In the first of these classes of cases the order to substitute service is, in general, absolute in the first instance; in the other, it is conditional.

Where defendant within jurisdiction.

1. When the defendant is within the jurisdiction, the plaintiff, if he seeks to substitute service, must show: 1st. That the cause of action arose within the jurisdiction, (*vide note (l) infra*); 2nd. That the defendant has not been served, and has not appeared and taken defence; and 3rd. That due and proper means were used to serve the writ in the manner prescribed by the former sections of the Act, (*vide p. 32, note (m)*).

Where defendant out of jurisdiction.

2. When the defendant is out of the jurisdiction, the plaintiff, if he seeks to substitute service, must show: 1st. That the cause of action arose within the jurisdiction, (*vide note (l) infra*); 2nd. That the defendant is out of the jurisdiction, (*vide p. 32, note (n)*); 3rd. That the defendant can be properly served through some agent or representative, or some manager of his real or personal estate within the jurisdiction, (*vide p. 32, note (o)*); or 4th, has removed to avoid service.

Old practice.

Previous to the passing of the Act, considerable doubts were entertained whether the Court had power under the old Act, 43 Geo. 3, c. 53, s. 7, to substitute service on a defendant out of the jurisdiction (*Burke v. Quinlan*, 3 Ir. L. R. 310), although ultimately it was held that it had (*Phelan v. Johnson*, 7 Ir. L. R. 527).

"Cause of action arising within jurisdiction."

(*l*) The phrase "the cause of action having arisen within the jurisdiction of the Court" is one, the construction of which has given rise to some difficulty both in this country and in England, where similar words, though of wider import, occur in section 18 of the C. L. P. Act, 1852. Thus it has been held by the Courts of Queen's Bench and Exchequer in England that the meaning of the phrase is that the *entire* cause of action should have arisen within the jurisdiction (*Sichel v. Borch*, 2 H. & C. 954; *Allhusen v. Margarejo*, L. R. 3 Q. B. 340); in which latter case a contract having been

English cases.

entered into abroad to deliver a quantity of manganese at a place within the jurisdiction, the Court held that a non-delivery at the place agreed on was not a cause of action arising within the jurisdiction. On the other hand, the Court of Common Pleas has held that it is not necessary that the entire cause of action should arise within the jurisdiction (*Jackson v. Spittall*, 39 L. J. Q. B. 321). Again the words "cause of action" in the section of the Civil Bill Act relating to costs, 14 & 15 Vict. c. 70, s. 40 (see now sect. 97 of the C. L. P. Act, 1856), have been held to mean the entire cause of action (*Hurley v. Lawlor*, 6 Ir. Jur. O. S. 344).

Notwithstanding, however, the decisions to the contrary above referred to, the Courts of Common Law in this country have repeatedly held, that service of the summons and plaint may be substituted, provided a part of the cause of action arose within the jurisdiction (*Betham v. Fernie*, 4 Ir. C. L. R. 92; *Kisbey v. Chester and Holyhead Railway Co.*, 6 Ir. C. L. R. 393; *Reilly v. White*, 11 Ir. C. L. R. 138).

How construed in this country.

But where the cause of action arose wholly out of the jurisdiction, the Court has no power to substitute service (*Collins v. De Montmorency*, 3 Ir. C. L. R. 473). Nor can a plaintiff join counts founded on such a cause of action with other counts, founded on a cause of action arising within the jurisdiction (*Whyte v. Hill*, 9 Ir. Jur. N. S. 288; *Diamond v. Sutton*, L. R. 1 Ex. 130).

Joinder of counts.

As instances of cases where the cause of action is considered as arising within the jurisdiction, reference may be had to actions against carriers, where the contract is entered into abroad to carry to a place within the jurisdiction. In such cases the Court will substitute service in case of non-delivery, no matter where the loss occurred (*Kisbey v. Chester and Holyhead Railway Co.*, 6 Ir. C. L. R. 393; *Powell v. Atlantic Steam Navigation Co.*, 10 Ir. C. L. R. App. 47; *Aston v. London & North-Western Ry. Co.*, Ir. R. 1 C. L. 604). Compare with these cases, *Watson v. Atlantic Steam Navigation Co.*, 10 Ir. C. L. R. 163; which, however, is distinguishable.

Where cause of action arises in actions against carriers.

The Court has also substituted service, where the contract was entered into within the jurisdiction, to carry to a place outside, and the breach occurred abroad (*Stevenson v. London & N. W. Railway Co.*, Ir. R. 1 C. L. 672). Similarly in an action by buyer against seller for a non-delivery of goods at a place within the jurisdiction (the contract having been entered into abroad), service will be substituted (*Adams v. Davison*, 6 Ir. Jur. N. S. 390). And where, upon the purchase of a floating cargo it was agreed that the seller should repay to the buyer the value of so much of the cargo as should, upon arrival, prove to be damaged, in an action to recover the value of the damaged portion, the Court substituted service (*Adams v. Mauvo*, 17 Ir. C. L. R. 686); with which compare *Adams v. Geralopollo*, 5 Ir. Jur. N. S. 217.

In actions for non-delivery.

Where work and labour has been rendered in Ireland under a contract made in England, the court will substitute service (*Reilly v. White*, 11 Ir. C. L. R. 148). And in an action for wrongful dismissal, where the agent had been appointed by a letter posted in London and directed here, and dismissed by a similar letter, the Court substituted service (*Hamilton v. Foreign and Mercantile Assurance Co.*, 3 Ir. L. T. 389).

Work and labour.

The Court will substitute service where an action is brought upon a policy of insurance effected in this country with an English company (*Kett v. Robinson* 4 Ir. C. L. R. 186; *Betham v. Fernie*, ib. 92).

Policies of Assurance.

Negotiable
instruments.

As to actions upon negotiable instruments made abroad, see *Fife v. Round*, 6 W. R. 282.

Foreign
judgments.

A foreign judgment for a debt contracted within the jurisdiction cannot be considered as a cause of action arising within the jurisdiction (*Thehall v. Felverton*, 16 C. B. N. S. 813; *Warren v. Grier*, 6 Ir. Jur. O. S. 233).

Due and
proper
means to
effect ser-
vice.

(m). For this purpose, the affidavit in support of the application should set forth the nature and times of such attempts, and also the last known or present residence of the defendant, and likewise must show facts and circumstances sufficient to satisfy the Court that proper means have been used to effect service in the manner prescribed (*Miller v. O'Brien*, 1 Ir. Jur. N. S. 109); and see sect. 32, ante, note (g).

Where
violence
employed.

In cases where violence is offered to the process server, the Court will substitute service (*Grady v. Kearny*, 8 Ir. C. L. R. App. 44).

Where de-
fendant a
lunatic.

Where the defendant is a lunatic, orders have been made to substitute service on him by serving the keeper of the asylum (*Wilmot v. Marmion*, 8 Ir. L. R. 224; *Vance v. O'Connor*, 11 Ir. L. R. 60). The keeper, however, should allow access to the lunatic for the purpose of service; and if he refuse to do so, it will be a contempt of Court (*Denison v. Harding*, 2 W. N. 17). As to the subsequent proceedings in an action against a lunatic, see post, sect. 51.

Where de-
fendant tem-
porarily
absent.

(n). The Court will not make an order under this section, when the defendant is only temporarily absent out of the jurisdiction (*McDonough v. McCarney*, 3 Ir. C. L. R. 239) in which case the defendant was away attending to his parliamentary duties (*Coates v. Fennell*, 6 Ir. Jur. N. S. 251). But if his absence be for the purpose of avoiding service, the section gives the Court power to substitute service in express terms.

On whom
service may
be substi-
tuted.

(o) For the purpose of substituting service on a defendant out of the jurisdiction, it is not necessary that the person on whom it is sought to substitute service should be the general agent or representative of the defendant; but there should be shown to be that relation which imposes an obligation on the person receiving the writ to communicate it to the defendant, and the possibility of communicating it should be moreover shown (*Reilly v. White*, 11 Ir. C. L. R. 138; per Pigot, C. B., 142).

When an
agency exists
"quoad hoc."

Thus the Court will substitute service, where an agency exists between the defendant and such third person *quoad hoc*, i. e. as to the very subject matter of the suit (*O'Dwyer v. Jackson*, 4 Ir. Jur. N. S. 129; *Purser v. Lusovich*, 15 Ir. C. L. R. App. 10), in which case, another action being pending by the defendant against the plaintiff for the price of a cargo of grain, the Court allowed service to be substituted upon the defendant's attorney in the first suit, the cause of action relating to the cargo (*Adams v. Davison*, 6 Ir. Jur. N. S. 390; *Wright v. Miller*, 1 Ir. Jur. N. S. 295).

Policies of
Assurance.

So also where an action is brought against a foreign merchant, and the action has relation to his mercantile transactions, the Court will substitute service on his agent here. Thus in an action for agency commission, where it appeared that the defendants, who were coffee merchants, had issued advertisements in which they announced that J. L. was their agent for Belfast, the Court made an order for substitution of service on J. L. (*Reilly v. White*, 11 Ir. C. L. R. 138); and see *Hegarty v. De la Sierra*, 2 Ir. Jur. O. S. 216. So also in action on a policy of insurance against an English Company, service will be substituted on their agent here (*Kett v. Robinson*, 4 Ir. C. L. R. 186).

The Court will not substitute service on a person who has been a partner of the defendant, where the partnership has been dissolved before action brought, although the cause of action accrued before dissolution, and is a partnership demand (*Payne v. Ryan*, 1 Ir. Jur. N. S. 317). In ordinary cases of partnership demands, however, service will be substituted on one partner for the other (*Mangan v. Jeff*, 12 Ir. L. R. 31; *Heydon v. Hammond*, 10 Ir. L. R. 268).

Substitution of service on a partner.

The Court will not substitute service on an attorney who is merely acting for the defendant in another action or suit (*Anon. v. Aylward*, 10 Ir. Jur. N. S. 415; *Carroll v. Tuthill*, 6 Ir. Jur. O. S. 244).

On law agent.

The cause of action may, however, be so far connected with the other matter in which the attorney is employed as to give the Court power to substitute service; as in *Purser v. Lusovich*, 15 Ir. C. L. R. App. 10; and see *Duffy v. Cowgill*, 13 Ir. L. R. 84, where, in an action for a malicious arrest under a Judge's fiat, the Court substituted service on the attorney who had acted for the defendant in the previous action.

A land agent comes within the express words of the section. Where, however, all that appeared was that the defendant was entitled to a portion of certain rents under his father's will, and that the executors were in receipt of the same, the Court refused to substitute service on the executors (*McKnight v. Macartury*, 1 Ir. L. T. 102).

Land agent.

The Court will not substitute service on a receiver appointed by the Court of Chancery over the defendant's property (*Wallis v. Austin*, 3 Ir. L. R. 258; *Carroll v. Tuthill*, 6 Ir. Jur. O. S. 244).

Receiver.

In *McDougall v. O'Shaughnessy*, 1r. R. 1 C. L. 86 (an action of ejectment), the Court substituted service on one trustee for his co-trustee.

Co-trustee.

In *Sheridan v. Stanford*, Batty, 123, service of a writ upon a sheriff was substituted by serving his sub-sheriff, the cause of action being for an act done by the sub-sheriff.

Sub-sheriff.

(p) In cases where service is substituted by serving a person within the jurisdiction, the service on such person must be personal. Leave may, however, be obtained to serve him otherwise, as in *Curmichael v. Newman*, 3 Ir. Jur. O. S. 9, where leave was given to substitute service by transmitting copies to the defendant's father, who was his land agent, and by posting copies on the father's dwelling place; and in *Hamilton v. B. & I. Marine Insurance Co.* Exch. 13th April, 1869, where an order was made for substitution of service by serving the writ at the registered office of the law agent of the defendant.

How the substituted service to be effected.

The person on whom service is substituted may come in to show cause against the order, and a time is limited in the order for such purpose. As to the manner of showing cause, and how the order is made absolute, in case no cause is shown, see 133-136, G. O., 1854; and *Vint v. Langtree*, 1 Ir. L. T. 279. The defendant may also come in to show cause against the order; and although an *appearance*, before the time when the appearance and defence were consolidated, operated as a waiver of the objection to the jurisdiction (*Forbes v. Smith*, 10 Ex. 717; *Staniforth v. Richmond*, 13 W. R. 724), yet a defendant may come in to show cause against the order, without waiving the objection (*Binet v. Picot*, 4 H. & N. 365; *Diamond v. Sutton*, L. R. 1 Ex. 130).

Showing cause against order.

Defendant coming in to show cause.

Where a conditional order for substitution of service has been made, and no cause is shown against it, the time for pleading is computed from the date at which the order is made absolute.

Time for pleading after order.

(*pp*) Where the defendant within six days after the substituted service tenders the sum due, together with the sum fixed for costs by 1 G. O. of 22nd Jan. 1856, the plaintiff is not entitled to the costs of the motion for leave to substitute service (*Atkinson v. Gregory*, 1 Ir. L. T. 157).

Affidavit of
service of
process.

35. An affidavit of the service of the writ of summons and plaint in the manner herein-before prescribed, or in the manner directed by any such order for liberty to substitute service as aforesaid, shall be made and filed in the office of the pleadings assistant of the Court in which the action shall be depending, in case it shall become necessary to mark judgment by default (*q*).

Affidavit of
service.

(*q*) The affidavit must, in addition to the matters mentioned in the section, state the day on which the indorsement of service was made upon the writ (sect. 31, *ante*). It must also state, in case personal service has been effected, that the process server is acquainted with the person of the defendant whom he has served (9 G. O., 1854). And by section 99 of the Act, it is the duty of the Master of the Court, before allowing a judgment by default to be marked, to see that a proper affidavit of service has been filed.

Affidavits in
certain cases
may be
sworn before
a Consul.
15 & 16 Vict.
c. 76, s. 23.

36. Any affidavit to be used in any of the said Courts may be sworn before any Consul-General, Consul, Vice-Consul, or Consular Agent for the time being appointed by Her Majesty at any foreign port or place; and every affidavit so sworn by virtue of this Act may be used and shall be admitted in evidence, saving all just exceptions, provided it purport to be signed by such Consul-General, Consul, Vice-Consul, or Consular Agent, upon proof of the official character of the person appearing to have signed the same (*r*): provided, that if any person shall forge the signature of any such affidavit, or shall use or tender in evidence any such affidavit with a false or counterfeit signature thereto, knowing the same to be false and counterfeit, he shall be guilty of felony, and shall, upon conviction, be liable to transportation for seven years, or to imprisonment for any term not exceeding three years, nor less than one year, with hard labour; and every person who shall be charged with committing any felony under this Act may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence may be laid and charged to have been committed, in the county or place in which he shall be apprehended or be in custody; and every accessory before or after the fact to any such offence may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence laid and charged to have

been committed, in any county or place in which the principal offender may be tried; provided also, that if any person shall wilfully and corruptly make a false affidavit before such Consul-General, Consul, Vice-Consul, or Consular Agent, every person so offending shall be deemed and taken to be guilty of perjury, in like manner as if such false affidavit had been made in *Ireland* before competent authority, and shall and may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence may be laid and charged to have been committed, in any county or place in which he shall be apprehended or be in custody, as if his offence had been actually committed in that county or place.

(r) By 18 & 19 Vict. c. 42, sect. 3, it is not necessary to give proof of the official character of the person appearing to have signed the affidavit, or of his signature thereto, where it purports to be signed by a person of the character above mentioned. Before whom an affidavit is to be made.

An affidavit intended to be used in any of the Superior Courts of Common Law, may be sworn in England or Scotland before the Commissioners appointed there to take affidavits, or before a Judge or other person empowered to administer oaths. In case it is sworn before a Judge, or such other person, see the 146th G. O., 1854.

In the colonies and in foreign countries, in addition to the persons mentioned in the section, affidavits may be sworn before any person empowered by the law of the country to administer oaths; but the signature of such person to the jurat, and also his authority to administer oaths, and take affidavits must be verified by an affidavit (*French v. Bellw*, 1 M. & S. 302; *Dinet v. Picot*, 4 H. & N. 365), or by the certificate of a notary public (*Ex parte Worsley*, 2 H. Bl. 275), or, it would seem, of the British Consul, or the Consul of the foreign country (*In re Barber*, 2 Bing. N. C. 268; *Houzellet v. Watson*, 9 Ir. L. R. 40). In the colonies and abroad.

With respect to the filing of the summons and plaint (s):

37. The original or duplicate summons and plaint (t), or a copy (u) thereof and of the endorsements thereon, and of the said particulars, certified by the attorney for the plaintiff to be a correct copy, shall, in order to enforce a defence thereto within the period of time in such writ mentioned, four days at least before the time for pleading thereto has expired (v), be filed with the pleadings assistant of the Court in which the action shall be depending, and such document shall be deemed to be a pleading of the plaintiff, and in lieu and stead of a declaration (w); provided, however, that no summons and plaint, or duplicate or copy, shall be filed as a pleading, unless the same shall be on parchment, and suffi- Filing of Plaint.
Filing plaint.

ciently legible, and in a fit state and form to be received as a pleading of the Court (*x*); provided also that in case such summons and plaint shall not be filed within the time aforesaid, it shall be sufficient, for the purpose of enforcing a defence thereto after the filing of the same, to give notice of the filing to the defendant (*y*), and such defendant shall have eight days from the service of such notice to file his defence thereto, but in no case shall the plaintiff be at liberty to proceed to enforce a defence after the expiration of six months from the service of such summons and plaint (*z*).

(*e*) This and the following section provide for the filing of the summons and plaint. It should be filed four days before the time for pleading expires: note (*v*). If not filed within that time, the plaintiff must serve the defendant with notice of filing, who will then have eight days to plead: note (*y*). If not filed within two months, the defendant may proceed to obtain a judgment of *non pros.* against the defendant (sect. 38, note (*b*)); and if not filed within six months, the plaintiff will be not able to proceed further with the action, although the cause is not even then out of Court: note (*z*). As to how time is to be computed, and how to proceed in the case of several defendants, see *infra*.

Time within which the writ is to be filed.

Where original writ destroyed.

Filing copy.

How time reckoned.

Where several defendants.

Marking judgment when writ filed.

(*t*) Where the defendant destroyed the original writ, the Court allowed a new writ to be issued and filed, and made a conditional order for leave to mark judgment (*Brunton v. Doyle*, 1r. R. 2 C. L. 86).

(*u*) In case any doubt should exist as to whether the service is good, it will be prudent to file a copy only, as it will then be unnecessary to apply to the Court for leave to take the writ off the file for the purpose of effecting fresh service.

(*v*) The days from the 1st August to the 20th October, inclusive, are not to be reckoned in the time for pleading (sects. 43, 232); and, therefore, not in the time for filing the plaint for the purpose of enforcing a defence without notice; neither can the plaintiff file the plaint during that period (sect. 232).

In the case of several defendants, the writ cannot be filed until the last of them has been served; and if at that time there be not four days to run of the time for pleading of the defendants previously served, notice of the filing must be served upon them (*Delmege v. Lloyd*, 4 Ir. C. L. R. 245). In actions of ejectment, it is now provided by the 3rd G. O., 1856, that the filing of the writ of ejectment, or copy, against one defendant served, shall be a sufficient filing as against the defendants subsequently served.

When the plaint is regularly filed, there is nothing in the Act or Orders to prevent the plaintiff from marking judgment in case no defence is filed, no matter what time may have elapsed. The 178th G. O. does not apply to such a case. Where, however, a year has elapsed, the plaintiff will not be allowed to mark judgment without some intimation to the defendant. In *Fleming v. Doherty*, 1r. R. 3 C. L. 571, the Court gave a conditional order for leave to mark judgment unless cause were shown in ten days; and in *Bell v. Bell*, 1r. R. 1 C. L. 571, the plaintiff having taken out a rule for liberty to proceed by analogy to the 178th G. O., the Court refused to set the rule aside.

Where the writ is amended by adding a new defendant, pursuant to sect. 89, the Court will not allow the writ to be taken off the file for the purpose of serving such new defendant (*Conolly v. Evans*, 7 Ir. Jur. O. S. 182). The side-bar order, giving leave to amend in such a case, should direct that service of an attested copy of the writ on the new defendant be deemed good service.

(w) The writ does not, properly speaking, become a "pleading" until filed. Hence it would appear that before that time a motion to set aside a summons and plaintiff as embarrassing or irregular is premature (*O'Brien v. Taylor*, 2 Ir. Jur. N. S. 53). The question was also discussed in *Doran v. Chancellor*, Ir. R. 2 C. L. 127, but not decided.

Effect of filing.

(x) See the 34th G. O., 1854.

(y) The Court will substitute service of the notice of filing (*Byrne v. Sherlock*, 8 Ir. C. L. R. Ap. 32). Where the pleading was not filed, though notice of filing was given, the Court refused to set aside a *non pros*. (*Lewis v. Boyce*, 2 Leg. Rep. 315).

Service of notice of filing.

(z) The six months after the expiration of which the plaintiff is precluded from taking proceedings to enforce a defence are inclusive of the days from the 1st August to the 20th October, notwithstanding that the plaintiff cannot be filed on those days (*Mullen v. Bonjor*, 5 Ir. C. L. R. 475). As to whether the time during which proceedings are stayed is to be reckoned, see *Johns v. Sanders*, 5 D. & L. 49; *Ross v. Green*, 10 Ex. 891. If the last day for filing the plaintiff fall on a Sunday or holiday, it is doubtful whether the plaintiff can be filed on the next day. See the 6th G. O., 1854, and *Blake v. Davis*, Bl. D. & O. 115; *Evans v. Jones*, 2 B. & S. 45. Under the old practice, if the plaintiff did not declare within a year after the return of the writ, the cause was out of Court; and in *Thompson v. Armstrong*, 1 Ir. Jur. N. S. 335, it was held by the Court of Common Pleas that, under the above section, a cause was out of Court if the plaintiff were not filed within six months after service, and therefore a judgment of *non pros*. could not be entered against the plaintiff after that period. This decision, however, has been overruled in *Doran v. Chancellor*, 17 Ir. C. L. R. 140; Ir. R. 2 C. L. 127, where it was held that, if another action be brought against the defendant after the expiration of the six months, he may plead *action pending*. On the other hand, after that period, the plaintiff can go no further with the action, and the only course he can adopt is to discontinue, and bring a fresh action. As to proceeding to mark judgment after the expiration of six months in cases where the plaintiff has been regularly filed, see note (v), *supra*.

How the six months computed.

Effect of not filing.

38. In case the plaintiff shall neglect to file the original or duplicate summons and plaintiff, or copy thereof, within two months (a) after the service thereof on the defendant, unless the time for filing such summons and plaintiff shall have been extended, such defendant may, on an affidavit of the service thereof and a certificate of no summons and plaintiff, or copy, filed, enter a rule that the plaintiff do file his summons and plaintiff within four days after the service thereof (b), or pay to the defendant such sum as shall be fixed by the taxing

Rule for costs of not filing summons and plaintiff.

officer, subject to the approval of the three Chief Judges of the said Courts, as and for his costs occasioned by being served with such summons and plaint (c), and such order shall be in lieu and stead and have the effect of a judgment of *non pros.* for not declaring; and in case the plaintiff shall, after the entry of such rule, file his summons and plaint, or copy, he shall pay to the defendant his costs occasioned thereby, upon demand, not exceeding the sum of one pound, or in default thereof the defendant may obtain a rule for the payment of such sum and the costs of such rule.

How time
reckoned.

(a) The days between the 1st August and 20th October, inclusive, are not to be reckoned in this period of two months (sect. 232). In replevin, if the plaintiff does not file the plaint within ten days after service, unless the time for filing be extended, the defendant may proceed to *non pros.* him; C. L. P. Act, 1856, sect. 100.

When defend-
ant may
rule plaintiff
to file plaint.

(b) As to ruling a plaintiff, see *post*, sect. 106. As long as the proceedings are stayed the defendant cannot *non pros.* the plaintiff, and a judgment of *non pros.* entered up will be set aside with costs (*Burgess v. Swayne*, 7 B. & C. 485). As to whether the time during which the proceedings have been stayed should be reckoned in the period of two months, see *Johns v. Sanders*, 5 D. & L. 49. The plaintiff by serving a notice of his intention not to proceed further with his action cannot prevent the defendant from entering up a judgment of *non pros.* (*Fitzgerald v. Power*, 1 Leg. Rep. 208). As to setting aside a judgment of *non pros.* see *Cater v. Flattery*, 5 Ir. L. R. 175; *Bacon v. Maunder*, 5 Ir. Jur. O. S. 118.

Where several
defendants.

The section does not in terms provide for the case of several defendants. Under the old practice, if the plaintiff was in default as to all, he might be *non-prossed* by one on behalf of all (*Hamlet v. Bingham*, 5 Sc. N. R. 389). But if not in default as to all, the defendant entering up the judgment should enter it up on behalf of himself alone (*ibid.*). Under such circumstances the plaintiff's course would be to apply to the Court to extend the time for filing the writ.

(c) By a G. O. of the 1st February, 1854, this sum has been fixed at £1 13s. 4d., with a further sum of 18s. where execution is issued.

Appearance
and defence.

With respect to the appearance and defence to the summons and plaint :

Appearance
and defence
to be filed
together.

39. The defendant may, within the time specified in the said summons and plaint, or within eight days from the service of the notice of filing the said summons and plaint in manner aforesaid, or at any time before judgment, or within such time as the Court or a Judge may permit (d), file with the pleadings assistant an appearance and defence or demurrer to the said writ of summons and plaint; and such defence may be according to the Form No. 2. in the Schedule B. to this Act annexed (e), and shall contain at foot thereof the

name and registered residence of the defendant's attorney, where the same is pleaded by attorney (*f*), and where it is pleaded in person the residence of the defendant, and in case such residence shall not be in the city of *Dublin*, shall specify by the name of the street and number of the house some place within the said city whereat all notices and papers relating to the suit may be served and delivered for the defendant (*g*).

(*d*) When the time for pleading is extended, the defendant may file his defence at any time up to the moment of marking judgment, even though the extended time has expired; and accordingly, where the defendant's attorney came to the office on the morning after the expiration of the extended time, for the purpose of filing the defence, and the plaintiff's attorney came at the same time for the purpose of marking judgment, it was held that the defence should have been received, and a judgment marked under the circumstances was set aside (*Robinson v. Woodroffe*, 4 Ir. L. T. 181).

Within what time defence may be filed.

Where time for pleading extended.

A defence cannot, however, be filed in an action of ejectment after the expiration of the statutable time (3 G. O. of 22nd January, 1856).

Ejectment.

(*e*) As to the form of the defence, see further, sect. 56, *post*. When there are several defences, each separate defence must be commenced in a new paragraph; 34th G. O., 1854. As to withdrawing a defence, see *post*, sect. 48, note (*r*); and as to pleas in abatement, sect. 56, *post*, and the 44th G. O., 1854.

Form of the defence.

The form of a demurrer is given in Schedule B., Form No. 3. As to the proceedings upon demurrer see *post*, sects. 80-82; and the 50th and 51st G. O. of 1854, which provide for the making up of the demurrer books.

Of demurrer.

(*f*) If the residence of the attorney be omitted, the defence will be irregular: see *Dempster v. Vernon*, 6 Ir. Jur. N. S. 366; and the 112th G. O., 1854.

Indorsement of attorney's residence.

(*g*) Where a defendant indorsed upon the defence a residence where he was not known, the plaintiff was allowed to serve a notice of motion by posting it at the office of the Court, and at the residence given (*Richy v. Crawford*, Ir. R. 2 C. L. 434).

Of defendant's residence.

40. In any case in which there are mutual debts between the plaintiff and defendant (*h*), or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party (*i*), one debt may be set off against the other, and such matter may be pleaded in bar of the action, or of the further maintenance thereof, or so much of the debt as it covers, and the account upon which it became due shall be alleged as in a summons and plaint for the same debt.

Defence by way of set off.
2 Geo. c. 22.
s. 13 (Eng.)

(*h*) The form of a defence of set-off is given in the schedule to the Act. A defence not containing an averment of the defendant's willingness to set off his demand against the plaintiff's claim is bad (*Toole v. Ryder*, Ir. R. 2 C. L. 652). So also if it omits to aver that the plaintiff "still is" indebted to the defendant (*Smith v. Fottrell*, 10 Ir. Jur. N. S. 232).

Set-off.

When a set-off may be pleaded.

The defence can be pleaded only where the claims on both sides are liquidated debts, or money demands. It is not applicable where the claim on either side is for unliquidated damages, as a claim under a guarantee, or a contract of indemnity (*Morley v. Inglis*, 4 Bing. N. C. 58; *Atwood v. Atwood*, 2 E. & B. 23); and so also upon a suggestion of breaches where the demand is unliquidated (*Lysaght v. Farmer*, 7 Ir. C. L. R. 404). In an action for use and occupation, the defendant was allowed to plead by way of set-off an agreement by the plaintiff to allow him for improvements, the value of the improvements being averred (*Julian v. Loughvane*, 8 Ir. C. L. Rep. 138). And see also *Anderson v. Carrick-on-Suir Gas Co.*, 3 Ir. L. T. 389. But a set-off cannot be pleaded to an action of ejectment for non-payment of rent (*Cahill v. Kearney*, Ir. R. 2 C. L. 498).

In actions by or against executors.

(i) In an action by an executor for money received by the defendant to the use of the plaintiff as executor, the defendant cannot set off debts due to him from the testator in his lifetime (*Rees v. Watts*, 9 Ex. 696, 11 Ex. 410); and *vice versa* (*Mardall v. Thellusson*, 6 E. & B. 976).

Particulars of set-off to be indorsed.

41. In case the defence shall insist upon any payment or set-off, the full particulars of the same shall be indorsed on the said defence and on the copies for service, unless they are so many that they cannot be conveniently introduced therein, in which case they shall be annexed thereto and incorporated therewith by a proper reference (j).

Particulars of payment and set-off.

(j) See the notes to sect. 11, *ante*, as to what the indorsement of particulars should in general contain.

When the indorsement dispensed with.

The time, mode, and amount of payment should be inserted in the particulars (*Bourke v. Scott*, 5 Ir. Jur. N. S. 100; *Roche v. Colclough*, 5 Ir. C. L. R. 538, 539); but if from the nature of the dealings between the parties accounts of the payments were not kept by the defendant, and it is impossible for him to recollect them, the Court will not require an indorsement (*Curly v. Clarke*, 8 Ir. Jur. N. S. 132; *Dixon v. Toole*, 4 Ir. C. L. R. 261). A defendant will not, where general payments have been made, be compelled to particularize to what items of the plaintiff's demand the payments relied on by him are applicable (*Kelly v. Hocoy*, 2 Ir. Jur. N. S. 394). If the defendant neglects to make the requisite indorsement, the defence will be set aside (*Smith v. Gilroy*, 7 Ir. Jur. O. S. 47; *Russell v. Nelson*, 3 Ir. C. L. R. 229). If the plaintiff has already given the defendant credit in the particulars indorsed upon the plaint for any payment, it will be unnecessary to plead it. See *ante*, p. 10.

Consequence of an omission to indorse.

The particulars do not form part of the pleading; and therefore, where the particulars of set off showed that a less sum was due than that mentioned and relied upon in the defence, and the plaintiff demurred in consequence, the demurrer was overruled (*Sigsworth v. Farrell*, Ir. R. 2 C. L. 321). The particulars should not contain allegations which might be traversed if pleaded (*Roche v. Colclough*, 5 Ir. C. L. R. 538).

Particulars not part of pleading.

What constitutes a payment.

The meaning of payment is, that the debt has been discharged by payment of the exact sum claimed; and where, therefore, to a plea of payment particulars were appended of a much larger sum than that claimed by the plaintiff, the defence was set aside (*Gafney v. Killen*, 4 Ir. Jur. N. S. 233).

42. No rule to plead shall be necessary, and the requisition to plead contained in the summons and plaint shall be sufficient for that purpose.

Rule to plead abolished.
15 & 16 Vict.
c. 76, s. 62.

43. Where the defendant is within the jurisdiction, the time for appearance and defence to the summons and plaint shall be twelve clear days from the days of the service thereof (*k*), exclusive of holidays, or eight days from the service of a notice of filing the summons and plaint, whichever period shall last expire, unless the Court or a Judge shall extend the time (*kk*); and the days for appearing to said summons and plaint shall run as well in vacation as in Term time, excepting the days from the first day of *August* to the twentieth day of *October* inclusive.

Time for pleading, where defendant is within jurisdiction, to be twelve days.

(*k*) It was held by the Court of Common Pleas in *Churchward v. Gram*, that the plaintiff could not mark a judgment till after the expiration of thirteen clear days from service. However, in *Boyd v. Nethery*, 10 Ir. C. L. R. 369, the Court reconsidered its former decision, and held that a judgment marked on the thirteenth day after service (exclusive of the day of service) was regular. The time during which proceedings are stayed does not count in the time for pleading: Day's C. L. P. Act, 3rd ed., p. 66; and where the time for pleading has expired at the time of the making of the order, the plaintiff cannot mark judgment till the day after that on which the stay is removed (*Decker v. Thompson*, 3 B. & P. 319); with which compare *Hiffernan v. Lavelle*, 2 B. & P. 363. And see *ante*, sect. 39; and the 54th and 57th G. O., 1854.

Time for filing defence.

Where proceedings stayed.

(*kk*) Where an order giving the defendant "a week's further time to plead" is made, the week does not begin to run until the ordinary time for pleading has expired (*Brady v. Pickering*, 2 Ir. L. T. 196).

44. Where an amendment of any summons and plaint hereby directed to serve as a declaration is allowed, no new requisition to plead thereto shall be necessary, but the defendant shall be bound to plead to the amended pleading within the time specified in the original requisition, or within two days after notice of the amendment, whichever shall last expire, unless otherwise ordered by the Court or a Judge; and in case the amended summons and plaint had been pleaded to before amendment, and is not pleaded to *de novo* within two days after notice of the amendment, or such other time as the Court or a Judge shall allow, the defence originally pleaded thereto shall stand and be considered as pleaded in answer to such amended summons and plaint (*l*).

Time for pleading after amendment.
15 & 16 Vict.
c. 76, s. 90.

(*l*) Under the 40th G. O. of 1854, no amendment of a writ or pleading can be made except by consent or order of the Court on motion, unless authorized by sections 87 and 89, *post*.

How an amendment made.

Time to
plead.
Where the
copy amend-
ed.

It should be borne in mind, that where the copy of the summons and plaint only is amended the Statute does not apply, and the defendant has twelve days to plead after service of the amended copy; and in case a judgment is marked before the expiration of such time, it will be set aside (*Holdbrooke v. Dymoke*, Ir. R. 2 C. L. 674).

Where writ
amended.

On the other hand, where the plaint itself is amended, the defendant must take care to plead within the time limited by the Statute, and if having pleaded to the plaint before amendment he files a new set of defences after the time limited, such defences will be set aside (*Banks v. O'Sullivan*, 2 Ir. Jur. N. S. 233). And in *Jones v. Jeffreys*, 7 Ir. C. L. R. 13, it was held that when a plaint is amended after demurrer, the defendant has twelve days to plead. See also *Smith v. Kearne*, 1 D. & L. 992; 12 M. & W. 715.

Copies to be
served.

45. Notice of filing such defence, together with a correct copy thereof, shall be served on the plaintiff's attorney, or on such plaintiff in case no attorney shall be employed; and such defence shall be considered as filed as on the day on which such notice and copy shall be served, pursuant to the provisions of this Act (m).

Omission to
deliver copy.

(m) When no notice or copy has been served, the plaintiff may apply to the Court for liberty to mark judgment (*Banks v. Jordan*, 7 Ir. Jur. N. S. 28). However, where a defendant omitted, for some days after filing his defence, to serve a copy thereof, but did so before the plaintiff had given notice of a motion for liberty to mark judgment, it was held that the defence became regular as soon as the copy was served, and the plaintiff could not afterwards object to it (*Moore v. McElroy*, 13 Ir. C. L. R. App. 49). In *Connolly v. O'Neill*, Ir. R. 1 C. L. 568 (an action of ejectment), the Court, under similar circumstances, allowed the defence to stand.

Delivery of
an incorrect
copy.

The attorney is responsible for the correctness of the copies of the pleadings furnished by him; and in case they are incorrect, he will be ordered personally to pay any costs occasioned thereby (*Alexander v. Morrison*, 2 Ir. Jur. N. S. 26; *Phibbs v. Tickell*, 3 Ir. Jur. N. S. 117; *McDonnell v. Evans*, 7 Ir. C. L. R. 401).

Further par-
ticulars.

46. The Court or a Judge may, in any case, by an order made on motion, direct a further or more detailed particular of the items of demand or credits referred to in any summons and plaint, or of any payments or set-off referred to in any defence to be furnished (n); and in any action for an injury to person or property, the Court or a Judge may order plans of the place in which the injury is alleged to have been committed, or as to which any justification is pleaded, to be given or exchanged between the parties; and the Court or a Judge may extend the time for pleading or making up the issue, in consequence of the necessity of such particulars or further particulars, on such terms as shall appear to be just; and

where any party shall require to amend his particulars, he shall apply to the Court or a Judge for the purpose (o).

(n) The Court possesses a general jurisdiction applicable to every species of action, and not confined to cases where the plaintiff is obliged by Statute to indorse particulars, to order the plaintiff to furnish the defendant with further particulars, if the circumstances of the case and the course of justice require it (*Early v. Smith*, 12 Ir. C. L. R. App. 35); and the action will be stayed until such particulars are given.

Jurisdiction of Court to order further particulars.

In order to obtain an order, the defendant must satisfy the Court by affidavit that he has not had sufficient means, from the statements in the plaint, of informing himself of what the plaintiff's demand is, and that it is necessary, for the purpose of framing his defence, to have more specific information than what is there contained (*Smith v. Hornsby*, 1 Ir. Jur. N. S. 184; *Ardrey v. Gardner*, 11 Ir. Jur. N. S. 47). The affidavit must in general be made by the plaintiff, or, under special circumstances, by his attorney (*Butson v. Allman*, Hay. & Jon. 746).

How order obtained.

The application should be made before defence (*Blackwood v. Jones*, 4 Ir. L. R. 328). Under special circumstances it may be made after; Ch. Arch. Pr. 12th ed. 1454; and see *Nolan v. Shea*, 1 Ir. L. T. 404, where such an order was made after defence pleaded in an action of slander, the plaintiff not appearing.

When application to be made.

In cases where the Statute expressly requires an indorsement of particulars, the Court will order a defective indorsement to be amended without requiring such an affidavit. (*Mahoney v. Falvey*, 7 Ir. Jur. O. S. 132, *per Green, B.*; *Neville v. Gollock*, 6 Ir. Jur. O. S. 232). So also, although in ordinary cases a defendant will not get the costs of a motion for further particulars, unless he has made a preliminary application, yet in *Neville v. Gollock*, *ubi supra*, it was held that it was not necessary, in order to carry costs, that a preliminary application should have been made, the action being for a liquidated demand; and see *O'Neill v. Orr*, 2 Ir. L. R. 287.

Where indorsement defective.

Costs of motion.

The making of the order is a matter for the discretion of the Court; and no order will be made, even in cases where the action is for a liquidated demand, if the plaintiff is unable to give the particulars (*Curly v. Clarke*, 8 Ir. Jur. N. S. 132; *King v. Armstrong*, Ir. R. 2 C. L. 495), which latter case was an action of ejectment.

Making of an order a matter of discretion.

Particulars may be ordered in any description of action. Thus, in *Sparkes v. Blacquière*, 6 Ir. L. R. 126, n., where the action was brought for breach of a covenant that a policy of assurance was good valid and effectual, and the breach was alleged in general terms, the plaintiff was ordered to furnish particulars of the breach complained of. In *Wildridge v. Clarke*, 11 Ir. L. R. 589, the action being brought for breach of covenant, by obstructing the tenants of the plaintiff in the enjoyment of an easement, the plaintiff was ordered to furnish particulars of the time and nature of the obstructions, and the names of the tenants obstructed. In actions for not repairing, it is the practice to order particulars of the non-repairs: Ch. Ar. Pr. 12th ed. p. 1452. And in *Abbott v. Woodroffe*, 1 Ir. Jur. N. S. 50, the plaintiff was ordered to furnish particulars of the credits allowed. So also in actions of torts, particulars of the times and places of the alleged trespasses and nuisances will be ordered (*R. v. Flower*, 7 Dowl. 665). In an action of slander, particulars will be ordered of the occasion on which the words were spoken, but not of the names or descriptions of the persons present (*Early v.*

When order will be made.

In actions of covenant.

Of trespass, or for a nuisance.

Of slander.

Particulars of fraud. *Smith*, 12 Ir. C. L. R. App. 35; *Slator v. Slator*, 8 Ir. Jur. N. S. 132), with which compare *Ardrey v. Gardiner*, 11 Ir. Jur. N. S. 47; and particulars of fraud relied on in the defence will be ordered (*M^cCreight v. Stevens*, 1 H. & C. 454). So also particulars of the symptoms of a disease relied on in a plea to an action on a policy of assurance will be ordered to be given (*Marshall v. Emperor Life Assurance Co.*, L. R. 1 Q. B. 35).

Of special damage. On the other hand, particulars of special damage, to which, in general, defendant cannot plead, will be refused (*Cornwall v. Hudson*, 7 Ir. Jur. N. S. 117; *Smith v. Hornsby*, 1 Ir. Jur. N. S. 184). So also particulars of

Of defence of *plene administravit*. payments relied on by an executor who has pleaded *plene administravit* will not be ordered (*Grand Canal Company v. Conolly*, 2 Huds. & B. 343), although interrogatories may be administered to a defendant in reference to such payments (*Peck v. Nolan*, 14 Ir. C. L. R. App. 32). And, as a general rule, a defendant or plaintiff cannot by means of a motion for further particulars obtain information which would be properly obtainable by means of interrogatories (*Cower v. Stephens*, 6 Ir. L. R. 124; *Smith v. Hornsby*, 1 Ir. Jur. N. S. 184). In *Echlin v. Brady*, 10 Ir. Jur. N. S. 188, where the action was for criminal conversation, the Court refused to make an order for particulars.

Operation of order. As the order for further particulars, when obtained by a defendant, operates as a stay of proceedings, the defendant cannot, in case the plaintiff fails to comply with the order, rule him under the 38th or 106th sections of the Act (*Wright v. Graves*, Batty, 331; *Burgess v. Swayne*, 7 B. & C. 485).

Amending particulars. (c) It is irregular to deliver further particulars, or to amend the particulars already given, without the leave of the Court; but leave will, in general, be given upon terms. Such leave may be obtained after the withdrawal of a notice of trial (*Frazer v. Montgomery*, 11 Ir. L. R. 28); or at the trial (*Savage v. Canning*, Ir. R. 1 C. L. 434); or after an abortive trial (*Kinnears v. Evans*, 1 Ir. Jur. O. S. 128). And see Ch. Arch. Pr., 12th ed., p. 1457.

Inspection and examination of premises or chattels may be ordered by the Court on behalf of either party. 17 & 18 Vict. c. 126, s. 58.

47. In any case in which it shall appear to the Court or Judge that it would be necessary, for the purpose of ascertaining the truth of any matter in dispute between the parties in the action, that an inspection or examination of any premises or chattels in the possession or power of either party, and in respect of which or some right or injury connected with which the said action shall be brought, should be had by the opposite party, his attorney, agent, witnesses, or by the jury (p), it shall be lawful for such Court or Judge to order that the party in whose possession or power the same shall be shall permit an inspection and examination of the said premises or chattels by the jury, or by such person or persons on behalf of the party applying, and at such times and under such regulations, as to the said Court or Judge shall seem fit (q).

(p) As to obtaining a view jury, see *post*, section 116.

(9) When an order is made under the above section, it may provide for the removal of obstructions to inspection (*Bennett v. Griffiths*, 3 E. & E. 467). It may be made pending a demurrer (*Boylan v. Dublin and Belfast Junction Railway Co.*, 7 Ir. Jur. O. S. 382). As to the form of the order, see *Ennor v. Barwell*, 8 W. R. 300; on appeal, 1 De G. F. & J. 529.

Form of order under section

With respect to the general form and character of pleadings :

Form of pleading

48. There shall be no further pleading after the defence (r), except a demurrer (s) to the defence or a replication to a defence of set-off (t) or plea of matter occurring subsequently to the commencement of the action (u), unless by the special leave of the Court or a Judge on an application to allow such further pleading (v), which shall only be allowed in case the real question or questions, whether of fact or law, between the parties cannot conveniently be raised and put in issue by the amendment of the previous pleadings (w).

No pleading after defence.

(r) When the defence is filed there can be no further pleading, except in the cases mentioned in the section, without the leave of the Court; but a demurrer may, notwithstanding the language of the section, be filed to the replication or other subsequent pleading without leave (*O'Brien v. Cecil*, 4 Ir. C. L. R. 271), in which case it was held that the 80th section of the Act limits the operation of the present section. Sections 57 and 59, *post*, provide for cases where it becomes necessary to reply, rejoin, &c., several matters after defence, or to reply and demur.

When leave to plead or demur must be obtained.

The language of the section is general, and applies to every description of pleading, including new assignment. As to the form of the replication, &c., see *post*, sects. 56 and 57, and the notes thereto.

If a defendant wishes to withdraw his defence, or a plaintiff his replication, it would appear that he cannot file a *retraxit* without the leave of the Court, which will only be granted on terms (*Bergin v. White*, 1r. R. 4 C. L. 306; *Londonderry Commissioners v. Ballantine*, 2 Ir. Jur. N. S. 367; *Sterne v. Jones*, 9 Ir. C. L. R. App. 31). As to withdrawing a defence after notice of trial is served and paying money into Court, see *Brown v. Julian*, 1 Ir. L. T. 156.

Withdrawing defence.

(s) *Vide O'Brien v. Cecil, ubi supra.*

(t) A replication to a set-off amounting to the general issue will be set aside (*Bergin v. Wrafter*, 7 Ir. Jur. O. S. 42); and if the plaintiff wishes to reply several matters which he might have pleaded without leave under section 58, had the defendant brought an action, leave must, nevertheless, be obtained (*Banahan v. Wallace*, 12 Ir. C. L. R. App. 13).

Replying to a defence of set-off.

(u) See section 73, *post*.

(v) A replication filed without leave will be set aside (*Mulligan v. Chute*, 6 Ir. Jur. O. S. 319). After the passing of the Act, it was held that leave to file a replication might be obtained without notice or affidavit (*Huston v. Wallace*, 3 Ir. C. L. R. 225); but this has been since overruled, and the application must be upon notice, and must generally be supported by an affidavit (*Dee v. Dee*, 7 Ir. C. L. R. 323; *Dunne v. Plunket*, 7 Ir. Jur.

How leave to reply to be obtained.

N. S. 323). But see *M'Sweeney v. Alern*, 1 Ir. L. T. 645, as to the practice in the Common Pleas.

In replevin, however, the replication being in the nature of a defence, a motion for leave to file several replications need not be upon notice (*Craig v. Murtagh*, 7 Ir. C. L. R. 506).

When it will be refused.

(w) Where the question can be raised by taking issue leave to reply will be refused. Thus leave to reply a traverse will not be given (*Murphy v. Nugent*, 6 Ir. Jur. O. S. 302). So also there is no necessity for replying a traverse of the averment of readiness and willingness in a defence of tender (*Bennett v. Parker*, Ir. R. 2 C. L. 89). Nor will leave be given to reply excess to a defence of *non assault demesne* (*Hughes v. Shaw*, 7 Ir. Jur. O. S. 292). Leave will, however, be always given to reply or rejoin where there is a *bonâ fide* question raised (*Egan v. Kenelly*, 1 Ir. Jur. N. S. 152; *Daly v. Nolan*, 7 Ir. Jur. O. S. 26). As to new assigning, see *Keaney v. Tottenham*, Ir. R. 2 C. L. 45; *Tallon v. Harria*, 9 Ir. Jur. N. S. 34; *Tracey v. Cruise*, Ir. R. 1 C. L. 576.

Replication and subsequent pleadings.

49. Every replication and subsequent pleading shall be pleaded, and notice of the filing, with a copy thereof, shall be served, and the particulars of any payments relied upon shall be indorsed or annexed thereto in a similar manner to that herein-before prescribed in respect of the defence, so far as the same shall be applicable thereto (x).

Within what time the replication is to be filed.

(x) See *ante*, sections 39, 41, and 45, and the notes thereto as to the form, &c., of the defence. No time is fixed within which a replication, &c., must be filed, further than that the plaintiff may be ruled under the 106th section of the Act if he do not go to trial within the time therein fixed. As to whether a plaintiff must, in order to obtain judgment after replication, serve notice of trial, or whether he may rule the defendant to rejoin or demur, and in default mark judgment, see *Blunt v. Evans*, 7 Ir. C. L. R. 97; *S. C.* in Cam. Scacc., 3 Ir. Jur. N. S. 340. As a general rule notice of trial must be served.

Plaintiff's course after filing replication.

Appointing next friend for plaintiff being a minor or lunatic.

50. In any case in which the plaintiff shall be a minor or lunatic (y), and before the filing of the summons and plaint as a pleading, a consent in writing, signed by some fit and proper person, to act as next friend to such minor or lunatic, together with an affidavit to verify the signature of such person, shall be lodged in the office of the Clerk of the Rules, who shall thereupon enter a rule that such person shall be at liberty to sue as next friend for such minor or lunatic (z), and the name of such next friend shall be mentioned in the said summons and plaint as next friend to said minor or lunatic: provided always, that the Court or a Judge shall and may alter or discharge such rule in case it shall seem necessary or proper (a).

How infants and lunatics may sue.

(y) At Common Law an infant could not sue or appear except by *prochein amy* or guardian. A lunatic, on the other hand, might sue and appear in the same manner as other persons (*Baverly's Case*, 4 Co. 124). Under the Statute, however, a lunatic must now sue and defend by next friend and guardian.

To proceed without appointing a next friend or guardian in cases where such a step is necessary, renders the proceedings irregular, if not void. And where an attorney appeared and defended for an infant without appointing a guardian, the proceedings were set aside, and the attorney ordered to pay the costs (*Keegan v. Shaw*, Ir. R. 2 C. L. 637); and see *Hunter v. Hunter*, Ir. R. 3 C. L. 40, as to the steps to be taken in such a case. See also the note to the next section, and the case of *Callisher v. Mason*, referred to there.

Consequence of not appointing a next friend.

The next friend of an infant plaintiff is liable to the costs of the action (*Newton v. London, Brighton, &c., Railway Co.*, 7 D. & L. 328). It was formerly held that the infant himself was not liable (*Grave v. Grave*, Cro. Eliz. 33). But now it would appear that if taken in execution he will not be discharged, but left to his writ of error (*Dow v. Clarke*, 1 C. & M. 860). On the other hand, an infant defendant is liable to the plaintiff for costs and damages (*Gardiner v. Holt*, 2 Str. 1217); and it would seem the guardian is not (*Ferguson v. Wilson*, 4 Ir. Jur. O. S. 376).

Liability of next friend to costs.

Where an action is brought by a lunatic, and money paid into Court, the Court will, where the circumstances require it, order the money, or a portion of it, to be paid out to the wife of the lunatic (*Rock v. Slade*, 7 Dowl. 22; *Glidden v. Treble*, 9 C. B. N. S. 367); or to the person in whose charge the lunatic is living (*Little v. Hewatt*, Ir. R. 1 C. L. 566; *Bray v. O'Keeffe*, 6 Ir. Jur. O. S. 246). See also *In re Barrett*, 7 Ir. Jur. O. S. 22, where the Court ordered the money to be invested.

Paying money into Court where action brought by lunatic.

(2) It is necessary to obtain a rule in the manner pointed out before a person can act as next friend or guardian (*Byrne v. Walsh*, 5 Ir. L. R. 217), and in order to obtain it satisfactory evidence of the fitness of the person proposed to be appointed must be furnished to the Clerk of the Rules by the attorney applying for the rule (*Ronayne v. Perrin*, 10 Ir. C. L. R. App. 36). In the case of an infant or lunatic plaintiff the name of the next friend need not be stated in the writ of summons and plaint before service; it is sufficient if it be inserted at the time of filing (*Grady v. Hunt*, 3 Ir. C. L. R. 522; *Callisher v. Mason*, 1 Ir. L. T. 45); if not inserted then, an application to the Court for leave to insert it must be on notice (*Phillips v. M'Evoy*, 7 Ir. Jur. O. S. 111). See also the 10th G. O. of 1854, as to the effect of an order to prosecute or defend for an infant.

How next friend appointed.

At what stage of the proceedings the appointment is to be made.

(a) The guardian or *prochein amy* is in effect an officer of the Court, and may be removed by an application to the Court at the instance of the infant, if a proper case be made out. If the *prochein amy* be insolvent in circumstances, the Court will not necessarily order security for costs to be given (*Yarworth v. Mitchell*, 2 D. & R. 423); but it may either remove him (*Savage v. Mapother*, 10 Ir. Jur. N. S. 117), or stay the proceedings till some proper person is appointed, or reasonable efforts made to procure one (*Duckett v. Satchwell*, 12 M. & W. 779). As to removing the guardian of an infant defendant, see *Ferguson v. Wilson*, 4 Ir. Jur. O. S. 376.

Removing guardian or next friend.

Where a *prochein amy* or guardian is removed, and another appointed, the change ought to be suggested, or noticed upon the record (*Davies v. Lockett*, 4 Taunt. 765).

51. In any case in which a defendant served with any summons and plaint shall be a minor or lunatic, the like proceeding shall be taken to appoint a guardian to defend for such minor or lunatic before filing any defence or demurrer,

Appointing a guardian for defendant being a minor or lunatic.

and the name of the person so appointed shall be mentioned in the defence as guardian to such minor or lunatic (b).

(b) As to the necessity of appointing a guardian to an infant defendant, and the manner in which the appointment is made, see the notes to the last section. The guardian need not be appointed until the time for filing the defence; and an infant defendant may, consequently, move to compel the plaintiff to give security for costs without appointing a guardian (*Callisher v. Mason*, 1 Ir. L. T. 45). As to the liability of the guardian for costs, see *Ferguson v. Wilson*, *ubi supra*.

Marking a judgment against an infant defendant.

Notwithstanding the provisions of sects. 96, 98, *post*, it would appear to be irregular to mark a judgment by default against an infant, unless a guardian has been appointed (*Jarman v. Lucas*, 15 C. B. N. S. 474). And the Court will not, in cases within the 98th section, put the infant to his writ of error, but will set aside the judgment (*Carr v. Cooper*, 1 B. & S. 230); and see *M'Master v. M'Assey*, 9 Ir. C. L. R. App. 12.

Security for costs, when and how to be obtained.

52. Any defendant served with any writ of summons and plaintiff in any action shall thereupon be deemed to be in Court for the purpose of making application to the Court or a Judge to compel the plaintiff to give security for costs, and for other like purposes: provided that no order for security for costs shall be made by reason of any plaintiff being resident out of the jurisdiction of the Court, at the instance of any defendant, unless upon a satisfactory affidavit that such defendant has a defence upon the merits (c).

Security for costs.

(c) Applications to compel a plaintiff to give security for costs are of frequent occurrence, and it will, therefore, be well to state here some of the cases in which such an order may be obtained, and how and in what manner the application is to be made.

When plaintiff resident out of jurisdiction.

As a general rule, when the plaintiff is resident out of the jurisdiction of the Court, the defendant may, if he has a defence upon the merits, obtain an order to stay the proceedings until security for costs be given, and it is no answer to the application that the plaintiff is possessed of considerable property within the jurisdiction (*Hickman v. Forde*, 8 Ir. Jur. N. S. 133; *Nagle v. Power*, 1 Jones, 420); but in England an order was refused where the plaintiff was possessed of property within the jurisdiction of a real or permanent nature, available to process (*Swinbourne v. Carter*, 23 L. J. Q. B. 16). In *Nagle v. Power*, *ubi supra*, the Court refused the order, the plaintiff consenting to allow the defendant to set off the rent payable by him against any costs that he might become entitled to.

Temporary residence within jurisdiction.

The order will be made only when the plaintiff is actually *resident* out of the jurisdiction; and if he have a temporary residence within the jurisdiction at which he is residing, he will not be compelled to give security (*Tom v. Nagle*, 13 Ir. C. L. R. App. 38; *Allain v. Chambers*, 8 Ir. C. L. R. App. 7; *Jones v. Haslem*, 11 Ir. Jur. N. S. 37; *Redmond v. Mooney*, 7 Ir. Jur. N. S. 277); in which latter case the plaintiff had resided for fourteen years in America, and had, on his return to Ireland, only taken lodgings. When the absence of the plaintiff out of the jurisdiction is merely temporary, he will not be ordered to give security for costs (*Taylor v. Fraser*, 2 Dowl. 622).

Temporary absence.

Notwithstanding that the plaintiff is actually resident abroad, no order

will be made if he be a Peer (*Marquis of Donegal v. Ingram*, 5 Ir. Jur. O. S. 395; *Earl of Kingston v. Sheehy*, Hay. & Jon. 358), or a naval or military officer engaged abroad in the public service (*Miller v. Young*, 1 L. Rec. O. S. 338), provided his domicile be Irish (*Chappell v. Watts*, 29 L. J. Q. B. 167), or a seafaring man with an occasional residence within the jurisdiction (*Conway v. Wilson*, 2 Ir. C. L. R. 47; *Keller v. Slattery*, Hay & Jon. 577), with which compare *Kerr v. Perry*, 6 Ir. Jur. N. S. 239).

Where there are several plaintiffs, if any one of them reside within the jurisdiction, security will not in general be ordered to be given (*Orr v. Bowles*, 1 Hodges 23; *McConnell v. Johnston*, 1 East, 431); but an order will be made where the action is brought by husband and wife, if the husband be resident abroad, although the wife be resident here (*Habgood v. Paul*, 8 Ir. C. R., Ap. 33).

Where security for costs is sought for by reason of the plaintiff's residence abroad, the Statute expressly requires that the defendant must have a defence upon the merits. A defence of infancy is a meritorious defence within the meaning of the section (*Dickson v. Buller*, 9 Ir. C. L. R., Ap. 13). So also a defence of set-off (*Martin v. Titmarsh*, 6 Ir. Jur. O. S. 269), or a defence of tender (*Anon.*, 7 Ir. Jur. O. S. 164). And it has been held that it is sufficient if the defendant have a defence to part of the action, as for instance, where he pays money into Court (*The United General Life Assurance Company v. Beale*, 8 Ir. C. L. R. Ap. 30; *Fox v. Atkinson*, 7 Ir. Jur. O. S. 259; *Mahony v. Kelcher*, 6 Ir. Jur. O. S. 239).

A plaintiff resident out of the jurisdiction will be compelled to give security for costs, notwithstanding that the action has been brought by order of the Court of Chancery (*Swan v. Reade*, 11 Ir. Jur. N. S. 58). So will a claimant in an interpleader suit (*Hoban v. Munro*, Ir. R. 2 C. L. 74), or the plaintiff in a writ of revivor (*O'Brien v. Upton*, 4 Ir. L. R. 419; *Archdall v. Supple*, 3 Ir. L. R. 287). As to giving security when a party appeals to the Court of Error, see sect. 172, *post*, and *Moore v. Great S. W. Railway Co.*, 9 Ir. C. L. R. Ap. 6. And as to giving security upon a suggestion of breaches, see *Thompson v. Donnelly*, 6 Ir. L. R. 30.

Although a plaintiff be resident within the jurisdiction, he will be ordered to give security for costs in certain cases. The order will not, however, be made (except in cases falling within 33 & 34 Vict., c. 109), merely because the plaintiff is a pauper, or bankrupt, or insolvent (*Delahay v. Kelly*, 2 Ir. C. L. R. 34), and this is so, even in a *qui tam* action (*Gregory v. Elgin*, 2 C. & M. 336). But if the plaintiff, in addition to being a pauper, has brought the action as the nominee of, or on behalf of others, the action will be stayed until security for costs be given (*Rice v. Dublin and Wicklow Railway Co.*, 8 Ir. C. L. R. 155; *Larkin v. Lawder*, 7 Ir. L. R. 227; *Egan v. Kirkaldy*, 3 Ir. L. R. 542). Compare with these cases *McCaffrey v. Brennan*, 10 Ir. C. L. R. 159; *Sutton v. Purdon*, 7 Ir. Jur. N. S. 324. And in actions of ejectment, a defendant taking defence may be compelled to give security for costs if it appears that the defence has been really taken in the name of the nominal defendant, by other persons, for the purpose of avoiding costs (*Stewart v. Bartholomew*, 1 Ir. L. R. 377; *Doe v. Richardson*, 2 Huds. & B. 117). Under the 23 & 24 Vict., c. 154, sec. 75, an overholding tenant may, in the cases provided for there, be ordered to give security for costs. In a *qui tam* action, if the proceedings are collusively taken in the name of a nominal plaintiff, the Court will make an order for security for costs (*Browne v. Redmond*, 11 Ir. C. L. R. Ap. 26;

Military officer.

Sailor.

Several plaintiffs.

Husband and wife.

Defence upon the merits.

Partial defence.

Security for costs in interpleader. Writ of Revivor.

Security for costs where plaintiff resident within jurisdiction.

Nominal plaintiff.

Defendant in ejectment.

Qui tam actions.

and see *Powell v. Reynolds*, 3 Ir. Jur. O. S. 59, 2 Ir. Jur. O. S. 292, as to ordering security to be given in actions for penalties under the 3 & 4 Vict. ch. 108, sect. 89.

Limited
Company.

By the 25 & 26 Vict. ch. 89, sec. 69, if a limited company be plaintiff, the Court may stay the action until security for costs be given, if it appears that there is reason to believe that the assets of the company will be insufficient to pay the defendant's costs in case he succeeds.

Finally, the defendant may compel the plaintiff to give security for costs in the cases provided for by the 33 & 34 Vict. c. 109, which see *post* in the Appendix.

Manner in
which appli-
cation is to
be made.
52nd G. O.

Assuming that the defendant is entitled to call upon the plaintiff to give security for costs, the next question is—when and in what manner the application is to be made? This is provided for by the 52nd G. O. of 1854, which directs that “where a defendant served with a summons and plaint shall require security for costs from the plaintiff, he shall be at liberty to apply by notice to the plaintiff for such security; and in case the plaintiff shall not, within twenty-four hours after service thereof, undertake by notice to comply therewith, the defendant shall be at liberty to apply to the Court or a Judge for such security, by motion on notice, grounded upon affidavit; and every such application shall be made before defence filed, unless the Court shall, under special circumstances, think fit to make such order, after defence filed.”

Preliminary
notice.

Accordingly, when a defendant requires security for costs, his first step is to serve the preliminary notice. In cases where the order is sought on the grounds of the plaintiff residing out of the jurisdiction, the plaintiff, when served with the notice, has a right to call on the defendant for an affidavit of merits, and if this be not complied with it may be grounds for refusing the application, or making the defendant pay the costs of the motion (*Samuelson v. Andrews*, Ir. R. 3 C. L. 575; *Coveney v. Gibson*, 6 Ir. C. L. R. 130). Supposing that the plaintiff, when applied to, fails to undertake to give security, the defendant's next step is to serve notice of motion. In actions brought under the Summary Procedure on Bills of Exchange Act, the defendant should, in the first instance, have obtained liberty to appear and defend (*Jackson v. Burton*, 8 Ir. Jur. N. S. 131; *Martin v. Wilson*, 7 Ir. Jur. N. S. 335). The notice of motion should not be served till the expiration of twenty-four hours from the service of the preliminary notice (*Jack v. Noble*, 17 Ir. C. L. R. 381). It must be served before the filing of the defence, and an omission to do so is not cured by the fact of the preliminary notice having been served (*Jacob v. Bernal*, 8 Ir. Jur. N. S. 46; *Bush v. Curran*, 9 Ir. C. L. R. Ap. 30; *Lunham v. Dublin, Wicklow, and Wexford Railway Co.*, 2 Ir. L. T. 24). Where the plaintiff omitted to file the plaint for a period of four months, the defendant was held entitled to require security for costs, though the application was not made until after the filing of the plaint (*Blake v. Blake*, 1 Ir. L. T. 701). Obtaining an extension of the time to plead is not a waiver of the defendant's right to apply for security (*Griffith v. Slaton*, 16 Ir. C. L. R. Ap. 1; *Clarke v. Riordan*, 9 Ir. C. L. R. Ap. 34). Neither is the giving of an undertaking to appear and defend by the defendant's attorney (*Clark v. Marsh*, 1 Ir. L. T. 622). But if after serving notice of motion the defendant files his defence, he thereby waives his right (*Beausang v. Condon*, 13 Ir. C. L. R. Ap. 37); unless with the copy of the defence he serves a notice, stating that the defence is filed without prejudice to his motion (*Gallon v. Armstrong*, 9 Ir. C. L. R. Ap. 46; *Taylor v. Low*, 3 Ir. C. L. R. 223). And if the defendant has ruled the plaintiff under

Notice of
motion.

When to be
served.

the 38th section of the Act, it would appear he cannot obtain an order for security for costs (*Parke v. Parke*, 1 Ir. C. L. R. 632).

In cases where the order is sought for on the ground of the plaintiff being resident out of the jurisdiction, the application must be supported by an affidavit of merits, which should, except under special circumstances, be made by the defendant himself (*Willans v. Paterson*, 8 Ir. C. L. R. Ap. 29; and see *Hickman v. Forde*, 8 Ir. Jur. N. S. 133). In the Courts of Queen's Bench and Common Pleas an affidavit stating that the defendant has a good and legal defence upon the merits is sufficient (*Hickman v. Forde*, *supra*; *Eyre v. Sparks*, 3 Ir. C. L. R. 542; *Spencer v. Campion*, 3 Ir. C. L. R. 231). But in the Exchequer, although the evidence need not be stated, the affidavit must set forth the general nature of the defence (*Shepperd v. Beamish*, 8 Ir. C. L. R. Ap. 59). The Court will not, however, hear any evidence to controvert the truth of the defendant's allegations (*Shepperd v. Beamish*, *ubi supra*; *Martin v. Titmarsh*, 6 Ir. Jur. O. S. 269).

Affidavit of merits.

The application can be made after defence filed only under special circumstances, as, for instance, if the plaintiff leaves the jurisdiction, after the filing of the defence, with the intention of residing permanently abroad (*Habgood v. Paul*, 8 Ir. C. L. R. Ap. 33; *Hodson v. M'Queen*, 7 Ir. C. L. R. 288). So, also, if *plene administravit* be the only defence pleaded, the defendant may apply after service of the notice of trial (*Anderson v. Walsh*, Ir. R. 2 C. L. 303).

When application may be made after defence.

As to compelling a plaintiff to give further security where the amount for which security was originally given proves insufficient, see *Levison v. Hodges*, 8 Ir. L. R. 112.

When an order is made for security for costs, it operates as a stay of proceedings until complied with. So, also, does an undertaking to give security (*Downie v. Moran*, 2 Ir. Jur. O. S. 93). And, pending such stay, the defendant cannot rule the plaintiff under the 38th or 106th sections of the Act (*Anderson v. Walsh*, Ir. R. 3 C. L. 97; *Fielden v. Donagh*, 8 Ir. C. L. R. Ap. 45). Nor does the time, during which the stay was in force, count in the periods of time mentioned in those sections, when the rule has been vacated or discharged, or complied with after the expiration of the period in question (*Ross v. Green*, 10 Ex. 891). As to issuing execution to enforce payment of costs previously awarded, *Re Drake v. Curtis*, 5 Ir. Jur. O. S. 124.

Operation of order.

As to setting aside a judgment marked after service of the preliminary notice or notice of motion for security for costs, see *Bredin v. M'Carthy*, 6 Ir. Jur. N. S. 158; *Stewart v. Vallance*, 10 Ir. C. L. R. Ap. 1, in both which cases the judgment was set aside, the motion for security for costs having been granted; and see the 54th G. O. 1854.

Operation of notice.

When a plaintiff comes to reside permanently within the jurisdiction after the making of the order, the order will be discharged (*Eyre v. Baldwin*, 4 Ir. C. L. R. 270; *Palmer v. Lord Ashbrook*, 4 Ir. Jur. O. S. 193).

Discharging order.

As to the manner in which security is to be given, see the 53rd G. O. 1854. And as to drawing out the money, in case the party lodging it becomes entitled to be repaid it, see the C. L. P. Act, 1856, sect. 102.

53. The Forms of pleading contained in Schedule C. to this Act annexed shall be sufficient in the cases to which they apply, and these and the like Forms may be used, with such modifications as may be necessary to meet the facts of the

Forms in Schedule C. may be adopted. 15 & 16 Vict. c. 76, s. 91.

case (d); but nothing herein contained shall render it erroneous or irregular to depart from the letter of such Forms, so long as the substance is expressed without prolixity (e).

When forms not applicable.

(d) In cases where the forms do not apply, they cannot, of course, be employed; and accordingly, in *Derrys v. Byrne*, 7 Ir. C. L. R. 302, the defence of *son assault de mesme*, given in Schedule C. to the Act (form 36), was held to be demurrable when pleaded in an action of assault and battery, on the grounds that it was an answer to the assault only, and not to the battery.

When departure from them fatal.

(e) A count for work and labour will be demurrable if it does not contain an averment that the work was done at the "request" of the defendant (*Corah v. Young*, 6 Ir. C. L. R. 138; *M'Phail v. Little*, 9 Ir. Jur. N. S. 267). The absence of the words "money payable by the defendant to the plaintiff," in an *indebitatus* count for goods bargained and sold, has been held not to be demurrable (*Gason v. O'Ryan*, 7 Ir. Jur. O. S. 272); with which compare *Place v. Potts*, 8 Exch. 705; *Wilkinson v. Sharland*, 10 Ex. 724, from which it would appear that in England the absence of the words in question would be good ground of demurrer, as not showing that the money is payable *in presenti*. In *Aldborough v. Hagarty*, 8 Ir. Jur. N. S. 341, a count for "money payable by the defendant to the plaintiff on an account stated between them" was held to be good.

And see further, sections 81 and 83, *post*, and the notes thereto.

Different causes of action may be joined, but separate trials may be ordered. 15 & 16 Vict. c. 76, s. 41.

54. Causes of action, of whatever kind (except in ejectment), may be joined in the same summons and plaint, provided they be by and against the same parties and in the same rights (f), except as herein-after mentioned; but the Court or a Judge shall have power to prevent the trial of different causes together, if such trial would be inexpedient, and to order separate records to be made up and separate trials had (g).

Must be in the same right.

(f) It will be observed that it is only causes of action in the same rights that can be joined. Therefore, a plaintiff cannot join a cause of action accruing to him in his own right, with one accruing to him as executor, nor can a defendant be sued in one count in his own right and in another as executor (*Nixon v. Quinn*, Ir. R. 2 C. L. 248; *Magennis v. Dempsey*, Ir. R. C. L. 327; *Davies v. Davies*, 31 L. J. Ex. 476). And such a misjoinder is good ground for demurrer. Similarly in actions against husband and wife, a cause of action against the husband only cannot be joined with a cause of action against the husband and wife.

When separate records will be made up.

(g) If an embarrassment would arise at the trial, from the different issues being tried together, the Court will exercise its power of directing separate records (*Cantwell v. Cannock*, 3 Ir. C. L. R. 78); and in England, previous to the late alteration in the law of evidence, counts founded on breach of promise of marriage were not allowed to be joined with counts founded on a different cause of action (*Sherratt v. Webster*, 8 L. T. N. S. 254).

Joinder of claims by husband and wife, with

55. In any action brought by husband and wife for any cause of action accruing in respect of the wife, and in respect of which she is necessarily joined as co-plaintiff, it shall be

lawful for the husband to add thereto claims in his own right, and separate actions brought in respect of such claims, if in the same Court, may be consolidated, if the Court or a Judge shall think fit; provided that in the case of the death of either plaintiff such suit, so far only as relates to the causes of action, if any, which do not survive, shall abate (h).

claims in right of husband. 15 & 16 Vict. c. 76, s. 40.

(h) Previous to this enactment, the law in reference to actions by husband and wife was, that the husband could not recover in the action any damages in respect to the cause of action to which he was entitled in his own right. Thus, he could not, in an action for an assault and battery upon the wife, recover the expenses to which he was put in curing her (*Dengate v. Gardiner*, 4 M. & W. 5). A count in respect of such damages might of course be now inserted pursuant to the above section; but the provisions of this section are permissive and not obligatory, and the husband may still bring his separate action (*Brookbank v. The Whitehaven Junction Railway Co.*, 7 H. & N. 834), subject, however, to the contingency of the actions being consolidated if the Court or Judge shall think fit.

Old law.

Although the section may appear to be limited by the words at the commencement, to actions brought for a cause of action accruing in respect of the wife, yet the words "claims in his own right" would seem to be wide enough to include claims not connected with the wife. And, accordingly, under the corresponding English section, where a husband brought an action for a personal injury to himself and to his trade by an explosion, and he and his wife brought a separate action for injuries sustained by her resulting from the same explosion, the Court of Exchequer consolidated the two actions (*Hemstead v. Phoenix Gas Co.*, 3 H. & C. 745; and see *Morris v. Moore*, 19 C. B. N. S. 359; *Morley v. Midland Railway Co.*, 3 F. & F. 961).

What claims a husband may join.

In every case where an action is brought by a husband and wife it should clearly appear in the summons and plaint in what right the wife is joined, and if it do not so appear the plaint will be bad on demurrer (*Cahill v. M'Dowall*, 13 Ir. C. L. R. 481), or it may be set aside (*Franklin v. Walker*, Ir. R. 4 C. L. 236).

Misjoinder of wife fatal.

It may be well to mention here that under the 33 & 34 Vict. c. 93, a married woman may now maintain an action in her own name for the recovery of any wages, earnings, money, and property declared by the Act in question to be her separate property, and for and in respect of the other matters therein provided for.

Action by wife in her own name.

56. The defence (i) and replication (j) and subsequent pleadings, if any, shall state all facts which constitute the ground of the defence or reply in ordinary language, and without repetition, and as concisely as is possible consistent with clearness; and if such defence or subsequent pleading is only applicable to a portion of the preceding pleading, the portion to which it is applicable shall be shortly referred to (k).

Form and nature of defence and subsequent pleadings.

General issue abolished.

When defence should be special.

(i) By the above section, and sections 70 and 71, *post*, the general issue is abolished, and the parties to the action required to state their case clearly and specifically. The defendant must, accordingly, take care, in framing his defence, to set out specially the facts on which he relies, whenever they are not admissible under the ordinary traverses, as otherwise he will be precluded from giving them in evidence at the trial. Thus, in *Leach v. Palmer*, 11 Ir. Jur. N. S. 395, where the action was brought for goods sold and delivered, it was held that the defendant could not, under the ordinary traverse, give in evidence an unexpired credit; and the ruling in this case was followed in *Strange v. Kelly*, 1 Ir. L. T. 713. In *Boake v. M'Cracken*, 6 Ir. C. L. R. 259, where the action was also for goods sold and delivered, and the ordinary traverse was pleaded, under which the defendant attempted to prove that the sale had been by sample, and that the goods delivered were not of the same kind as the sample, the Court of Common Pleas was equally divided as to whether the evidence was admissible. In *Mosely v. M'Mullen*, 6 Ir. C. L. R. 69, it was, however, held by the Court of Exchequer, in a similar action, that a special defence, stating that the contract was made on certain conditions not complied with, is unnecessary, as that defence may be given in evidence under the ordinary traverse; and in cases where the plaintiff relies in his plaint upon a special contract, it has been frequently held that although a defendant may allege in his defence that the contract was subject to a condition not fulfilled, yet it is unnecessary for him to do so, as he may give it in evidence under the ordinary traverse (*Kenyon v. Tayleur*, 8 Ir. C. L. R. Ap. 76; *Habgood v. Paul*, 8 Ir. C. L. R. Ap. 23); and see further as to when it is necessary to plead facts specially, sect. 48, *ante*, note (w).

As to the requirements of pleadings in general, and the grounds on which they may be objected to or set aside by the opposite party, see *post*, ss. 70 and 71, and the notes to ss. 81 and 83.

Pleas in abatement.

When the defendant pleads in abatement, he must, pursuant to the 6th Anne, c. 10, s. 11, verify his pleading by an affidavit, which, by the 24th G. O. of 1854, must be annexed to the pleading and entitled in the cause. The whole of the pleading in such a case must be verified (*Odell v. Raymond*, 2 F. & S. 21); and if this be not done, the plaintiff may obtain leave to mark judgment (*Coleman v. Brady, Smythe*, 155).

Replication.

(j) The replication must, like the defence, state concisely the facts constituting the grounds of reply, and it is in general subject to the same rules as to duplicity, &c., as the other pleadings. Accordingly, when leave is given to reply and join issue (which latter must be done in the form of a replication), the replication must be single, and leave must be obtained to reply several matters if the plaintiff should desire to do so (*Germaine v. Athenæum Assurance Company*, 5 Ir. C. L. R. 205; *Naghten v. Kelly*, Ir. R. 1 C. L. 556). As to new assigning, see *Keaney v. Tottenham*, Ir. R. 2 C. L. 45; *Tallon v. Hassard*, 9 Ir. Jur. N. S. 34; and as to replying and new assigning, see *Tracey v. Cruise*, Ir. R. 1 C. L. 576.

Defence to part only.

(k) If the portion to which the defence is applicable is not referred to, the plaintiff may set the defence aside (*Ammarman v. Robins*, 7 Ir. C. L. R. 415; *Dunsandle v. Finny*, 10 Ir. C. L. R. 171).

Several matters may be pleaded at any stage of the pleadings.

57. The plaintiff in any action may, by leave of the Court or a Judge, plead in answer to the defence or the subsequent pleading of the defendant as many several matters as he shall think necessary to sustain his action; and the defendant in

any action may, by leave of the Court or a Judge, plead in answer to the summons and plaint or other subsequent pleading of the plaintiff as many several matters as he shall think necessary for his defence, upon an affidavit of the party making such application or his attorney, if required by the Court or a Judge, to the effect that he is advised and believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded as aforesaid by way of confession and avoidance are respectively true in substance and in fact (1).

15 & 16 Vict.
c. 76, s. 81.

(1) Leave may be obtained under this section to plead several defences, notwithstanding that they are inconsistent with one another, provided the necessity for pleading them be shown (*Hall v. O'Flaherty*, 6 Ir. Jur. O. S. 113). Leave, too, may be obtained to plead in bar and in abatement (*M'Mahon v. O'Neill*, 6 Ir. Jur. N. S. 18). And in actions of libel and slander leave has been given to traverse that the words were spoken of the plaintiff, that they were spoken in the defamatory sense, and to plead privilege (*Lytle v. Hunter*, 3 Ir. Jur. N. S. 142; *Alexander v. Robinson*, 8 Ir. Jur. N. S. 414). In an action for an assault, leave has been given to plead that the assault, &c., was committed for the purpose of preventing a breach of the peace, and a certificate under 24 & 25 Vict. c. 94, s. 44 (*Lawler v. Kelly*, 15 Ir. C. L. R. Ap. 1); and numerous instances of several pleas allowed to be pleaded may be seen in Ch. Arch. Pr. 12th Ed., p. 279.

Inconsistent
defences.

On the other hand, where the action was for libel, leave to plead a traverse of the defamatory sense, and an apology and payment into Court under the 6 & 7 Vict. c. 96, has been refused (*Barry v. M'Grath*, Ir. R. 3 C. L. 576). And when money is paid into Court under sect. 75 of the Act, leave to plead another defence in addition to a plea of payment, will be refused (*Kelly v. Slater*, 7 Ir. C. L. R. 55; with which compare *Ryan v. Roughtan*, Ir. R. 4 C. L. 337).

In actions of
libel.

Where
money paid
into Court.

Where the defences sought to be pleaded are grossly inconsistent, leave to plead them will be refused . . . v. *M'Donough*, 3 Ir. C. L. R. 584.

In actions of seduction, leave to plead a traverse of the service with other defences will be generally refused, except under special circumstances, *Hall v. Devereux*, Ir. R. 4 C. L. 265, 268). In *Bone v. Smith*, Ir. R. 2 C. L. 244, the Court in such an action gave the defendant, under the circumstances of the case, leave to withdraw a traverse of the service, and to plead the Statute of Limitations.

Where a plaintiff obtains leave to reply and demur, he cannot reply generally taking issue; and if he replies several matters without obtaining leave, his replication will be set aside (*Germaine v. Athenaeum Life Assurance Co.*, 5 Ir. C. L. R. 205).

Several
replications,

For the purpose of obtaining leave to plead several defences, the application must in general be supported by an affidavit in the terms of the section. It need not necessarily be positive in its terms; belief is sufficient (*O'Hara v. Mitchell*, 6 Ir. Jur. O. S. 248). The affidavit should, however, state specifically the matters intended to be pleaded, and then proceed to verify them (*Sheehan v. Prendergast*, 1 Ir. Jur. N. S. 49); and when the defences sought to be pleaded are special in their character, a fuller verification

How leave
obtained.
Affidavit.

may be required. The party applying must also take care not to suppress in his affidavit any circumstances which, if they were before the Judge, would induce him to refuse the application; and if he do so, the defences may be set aside (*Finn v. Albert Insurance Company*, 8 Ir. Jur. N. S. 94).

The Judge may, however, in his discretion, give leave to plead several defences without any affidavit (*Cooke v. Levey*, 7 Ir. C. L. R. 506; *Williamson v. Gallagher*, 1 Ir. Jur. N. S. 50).

A certificate must, in every case, be given by counsel, that the proposed defences are proper and necessary; and unless the certificate be given no order will be made out in the office (*Cullinan v. Walker*, 8 Ir. Jur. N. S. 93).

When leave to plead several matters is obtained, the defences pleaded in pursuance thereof must strictly follow the terms of the order (*Dixon v. Franks* (7 Ir. Jur. O. S. 239); and if they do not, the plaintiff may mark judgment (*Bailey v. Baker*, 9 M. & W. 769). The defendant may, however, abandon a defence he has obtained leave to plead.

Defences
without
leave.

If defences have been filed without leave, the defendant may afterwards apply for leave that they may stand (*M'Loughlin v. Jeffers*, 12 Ir. C. L. R. App. 50); and if they have been filed before the expiration of the time for pleading, it would be irregular for the plaintiff to mark judgment until the time has expired (*Nolan v. Collins*, 6 Ir. Jur. O. S. 210).

Marking
judgment.

By the 45th G. O., 1854, "if either party, without a rule for that purpose, plead and demur, or reply and demur, or plead or reply several matters, for the pleading of which a rule is required, the opposite party may mark judgment without notice."

When called on to mark judgment under this Order, the Master should exercise a judicial authority in determining whether the case comes within the Order or not (*Cullinan v. Walker*, 8 Ir. Jur. N. S. 93). In *Austin v. Twite*, 8 Ir. C. L. R. 30, the Court held that the words, "several matters" spoken of in the Order, refer to several matters pleaded in several distinct pleas, but are not intended to include several matters introduced into one plea; the plaintiff's course in the latter case being to apply to the Court under the 83rd sect. of the Act. And see also *Spaddacini v. Walsh*, 5 Ir. Jur. O. S. 55. As to setting aside a judgment regularly marked pursuant to the General Order, see *Murphy v. Nugent*, 6 Ir. Jur. O. S. 257.

Certain de-
fences may
be pleaded
together
without
leave.
15 & 16 Vict.
c. 76, s. 84.

58. The following defences, or any two or more of them, may be pleaded together as of course, without leave of the Court or a Judge; that is to say, a defence denying any contract or debt alleged in the declaration, a defence of tender as to part, a defence of the Statute of Limitations, set-off bankruptcy of the defendant, discharge under an Insolvent Act, *plene administravit*, *plene administravit prater*, infancy, coverture, payment, accord and satisfaction, release, a denial that the property, an injury to which is complained of, is the plaintiff's, leave and licence, *son assault demesne*, and any other pleas which the Judges of the said Superior Courts, or any eight or more of them, of whom the Chief Judges of the said Courts shall be three, shall, by any Rule or Order to be from time to time by them made in Term or Vacation, order or direct (*m*).

(m) Where a defendant applied for leave to plead payment into Court as to part of the demand, and payment and set-off as to the residue, no rule was made upon the motion, as such an application was unnecessary (*Hoare v. Stafford*, Ir. R. 4 C. L. 217); and see *Hull v. O'Flaherty*, 6 Ir. Jur. O. S. 113. When leave unnecessary.

59. The defendant may, by leave of the Court or a Judge, plead and demur, or the plaintiff may reply and demur to the same portion of the summons and plaint or defence at the same time (n) upon an affidavit by the party pleading, or his attorney (o), if required by the Court or a Judge, that he is advised and believes all the objections raised by demurrer are good and valid objections in law; and it shall be in the discretion of the Court or a Judge to direct which issue, whether of fact or law, shall be first disposed of (p). Double pleas and demurrer 15 & 16 Vict. c. 76, s. 80.

(n) The application for leave to plead and demur must be upon notice (*M'Lester v. Fagan*, 9 Ir. C. L. R. Ap. 25); and when the party applying seeks to take issue upon the entire of the pleading objected to, his course is to apply for leave to reply, and not to take issue (*Germaine v. Athenaeum Life Assurance Co.*, 1 Ir. Jur. N. S. 316). As to the form of the replication in such a case, see ante, note (l). Leave to plead and demur. Taking issue and demurring.

It is a matter altogether for the discretion of the Court to grant or refuse the application (*Thomas v. Knowles*, 24 L. J. Ex. 43). The Court has, however, no power under the section to allow a defendant to rejoin and demur (*Dunne v. Gumley*, 8 Ir. C. L. R. Ap. 2). In such a case, the defendant's only course would be to rejoin, and then, if necessary, move afterwards in arrest of judgment; and if he demurs, and fails upon demurrer, the overruling of the demurrer admits the replication to be true in substance and in fact (*Roe v. Hogg*, 7 Ir. C. L. R. 459). As to allowing a party unsuccessful on demurrer to withdraw his demurrer and take issue in fact, see *McEniry v. Waterford and Limerick Railway Co.*, 8 Ir. C. L. R. Ap. 61, and the notes to sect. 82, post.

Rejoining and demurring.

(o) See *Fox v. Broderick*, 9 Ir. Jur. N. S. 17.

(p) It is a matter for the discretion of the Court or Judge whether it will direct the issue of law or fact to be first disposed of; but where the demurrer goes to the whole cause of action or defence, it will generally direct the issue in law to be first disposed of (*Knight v. Lynch*, 8 Ir. C. L. R. Ap. 67).

Which issue will be first disposed of.

When the party demurring succeeds, he must, if he wishes to withdraw his replication, pay the other side the costs occasioned thereby (*The London-derry Commissioners v. Ballantine*, 2 Ir. Jur. N. S. 367). Where a defendant pleaded and demurred, and was successful on demurrer, the Court refused to compel him to enter a judgment of *nil capiat*, so as to enable the plaintiff to bring error without trying the issues in fact (*Hinton v. Acraman*, 3 C. B. 736).

Withdrawing replication.

Where a defendant pleads and demurs, and is unsuccessful on demurrer, the Court has not, it would seem, power under this section to direct the issues of fact to stand over until after the demurrer is finally disposed of in the Court of Error (*Lumley v. Gye*, 2 E. & B. 216).

When error may be brought.

60. The costs of every issue, whether of fact or law, shall follow the finding or judgment upon such issue, and be ad-

Costs of several issues.

Reg.
Gen. H. T.
1853, r. 62.

judged to the successful party, whatever may be the result of the other issues (q); and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs, if the defendant shall proceed with due diligence to tax the same; and the costs of all issues found for the plaintiff shall be deducted from the defendant's costs, if the plaintiff shall proceed with due diligence to tax the same (r); and if said costs so to be deducted shall not in either case be taxed in time for the purpose of deducting the same from the costs of the opposite party, they shall be separately recoverable by execution, when taxed and ascertained.

Where issue
composed of
several parts.

(q) When an issue, in fact, is single, although composed of several parts, and some of the parts are found in favour of the plaintiff, and some in favour of the defendant, the party who substantially succeeds upon the issue, i. e. who would be entitled to judgment if the decision of the case rested upon the issue in question, is entitled to the costs of so much of the issue as was found in his favour, and the other party is entitled to no costs in respect of the part of the issue found in his favour (*Reynolds v. Harris*, 28 L. J. C. P. 26; *Foot v. Barker*, 7 Ir. Jur. O. S. 47). In the latter case it seems to have been considered by Pennefather, B. that neither of the parties would be entitled to any costs. *Reynolds v. Harris*, however, is a clear authority that the successful party is entitled to the costs of the portion found in his favour.

Where issue
amended.

Where, at the trial of an action of libel, the statement of the words in the summons and plaint and in the issue, was amended for the purpose of avoiding a variance, and the plaintiff succeeded on the issue so amended, he was held entitled, under the circumstances, to the costs of the issue so amended (*Davis v. Reeves*, 5 Ir. C. L. R. 533).

Where jury
discharged
from finding.

When the jury are discharged by consent from finding on certain issues, no costs of those issues will be allowed, nor the costs of a motion respecting them (*King v. Promoter Assurance Co.*, 6 Ir. Jur. N. S. 373). But where the jury was discharged from finding on certain issues without the plaintiff's consent, and the defendant had a verdict upon the other issues and became entitled to the general costs, the plaintiff was held entitled to the costs of the issues which the jury were discharged from finding upon (*Smyth v. Galbraith*, 11 Ir. Jur. N. S. 359).

Apportion-
ment of
costs.

Where certain issues are found for the plaintiff, and certain others for the defendant, and a general verdict is given for the plaintiff, the rule in taxing the costs is, that the plaintiff gets all the costs which are not exclusively applicable to the issues on which he has failed, and the defendant is only entitled to the costs exclusively applicable to the issues on which he has succeeded, and there can be no apportionment unless the taxing officer can ascertain satisfactorily the costs applicable to the portion of the case on which he has succeeded (*Morgan v. Gray*, 10 Ir. Jur. N. S. 336; *Guinea v. Allen*, Ir. R. 1 C. L. 331; *Leclerc v. Greene*, Ir. R. 4 C. L. 388).

(r) In practice, both bills of costs are certified, and the deduction is made on the back of the certificate of the bill larger in amount.

Where plain-
tiff entitled
to no costs.

Where the plaintiff obtains the general verdict, but is entitled to no costs, or half costs only, by the operation of section 243 of the present Act, or section

97 of the C. L. P. Act, 1856, the defendant is entitled to the full costs awarded him by the above section. The Court will, if necessary, order a party entitled to the costs of issues found in his favour to tax them, in order that they may be deducted from the costs of the party entitled to the general costs, and if he refuses to do so, will make an order barring him from any future proceedings for the recovery of these costs (*Nolan v. Flannery*, 3 Ir. L. T. 313).

61. No useless form or fiction, such as express colour or special traverse, shall be used, nor shall it be necessary to allege any matter that need not be proved, regard being had to the substance and ground of the action or defence.

Forms and fictions abolished.

62. The venue in any personal action may, except as herein-after stated, be laid in any county which the plaintiff thinks proper (*r*); and the name of such county shall be stated in the margin of the summons, and shall be taken to be the venue intended by the plaintiff (*s*); and no venue shall be stated in the body of the summons or in any subsequent pleading; provided it shall be lawful for the Court or a Judge to order such venue to be changed by an amendment of such summons and plaint to any other county or county of a city or town, in which the trial can be more conveniently or properly had, on special grounds only, and not merely because the cause of action accrued in any particular place or county (*t*).

Venue to be stated only in margin of summons and plaint.

(*r*) The venue in an action of ejectment is local. The Court may, however, change the venue in such an action as well as in a personal action (sect. 196, *post*).

Venue where local.

In the case of a suggestion of breaches the venue is the same, it would appear, as that stated in the original writ; and it can only be changed by an order of the Court (*Castlereagh Union v. Carroll*, 6 Ir. Jur. O. S. 314).

Suggestion of breaches.

By sect. 151, *post*, the venue in a writ of revivor may be laid in any county.

Writ of revivor.

In actions where the venue was localized by Acts passed previous to the present Statute, it is now transitory, by virtue of the above section, although the Acts so localizing it are not enumerated among the Acts repealed by sect. 3, *ante* (*Tate v. Matthew*, 17 Ir. C. L. R. 641; S. C. in error, 1 Ir. L. T. 646).

(*s*) The omission of the venue is an irregularity for which the writ may be set aside. Where a plaintiff applies for leave to amend the omission, and offers the defendant proper terms, the latter will not get the costs of appearing upon the motion (*Tuomey v. Formey*, 7 Ir. Jur. O. S. 138).

Omission to state venue.

If a wrong venue is stated in a local action, and the error appears upon the record, the objection may be taken on demurrer (*Clayton v. Best*, 8 L. T. N. S. 502). As to non-suiting the plaintiff at the trial, when the error does not appear upon the record, see *Richardson v. Lochlin*, 6 B. & S.

777. And as to amending such an error, see *Hanbury v. Jones*, 15 Ir. C. L. R. 442; *The Grocer's Co. v. Coll*, 9 Ir. L. R. Ap. 8). In the latter case a judgment by default having been marked, and the plaintiff having applied for leave to issue an *habere* into the proper county, the application was refused.

Where the venue was stated in the margin as "City of Dublin," the statement was held to be sufficient (*Courtenay v. Blake*, 8 Ir. C. L. R. Ap. 49).

Changing
the venue.

(t) Under this section the Court has power to order the venue in the action to be changed to any other county, or county of a city or town, in which the trial can be more conveniently or properly had; and accordingly applications to the Court for this purpose are very frequently made.

Inasmuch as the ruling of the Court in each case must largely depend on the particular circumstances involved, a reference to the cases is only useful as showing the general principles acted on. At present, the tendency of the Courts is to change the venue to the county where the cause of action arose, as it generally happens that the trial can be had there much more conveniently and properly than elsewhere.

Either party may apply to change the venue; and the Court may, if it thinks fit, after so changing the venue, re-change it, either to the old venue or elsewhere (*Atkinson v. Mills*, 8 Ir. Jur. N. S. 153).

Grounds on
which venue
changed.

The grounds indicated in the section as being those upon which the Court may change the venue are twofold—1st, on the ground of convenience; 2nd, on the ground that the trial can be more properly had elsewhere.

Grounds of
convenience.

As regards the ground of convenience, it was laid down in *Morrissey v. Connell*, 1 Ir. Jur. N. S. 174 (a case decided soon after the passing of the Act), that, in order to enable the Court to act, it must come to the conclusion affirmatively that a change of the venue would be productive of greater convenience; and where there is a balance of convenience or near it, that no change ought to be made. The party must show some sensible, reasonable, and absolute inconvenience. If the witnesses are numerous, and all resident in the county where the cause of action arose, or though they be not numerous, the parties are very poor, or if the trial is had in any particular place for purposes of oppression, it is the duty of the Court to change it (per Monahan, C. J.).

Residence
of witnesses.

Accordingly where all the witnesses reside in a county at a distance from that where the venue is laid, the Court will change the venue to the county where the witnesses reside (*M'Dermott v. Jameson*, 1 Ir. Jur. N.S. 51; *M'Keown v. Stewart*, ib. 127). But in such cases, if the plaintiff undertakes to bear all the additional expenses which may be incurred by reason of the trial being had where the venue was originally laid, the Court may refuse to interfere (*Banks v. O'Sullivan*, 2 Ir. Jur. N. S. 99). So also if the effect of the trial being had in the venue originally laid would be to bring away a number of railway or other public officials from the place where they are employed, and so cause inconvenience to the public, the Court will generally change the venue (*Allen v. Cork and Bandon Railway Co.*, 1 Ir. Jur. N. S. 132; *Attwood v. Ridley*, 2 M. & G. 893). On the other hand, as the statute gives the plaintiff a *prima facie* right to lay the venue where he pleases, the Court will not disturb the venue as laid, merely because the cause of action arose elsewhere, whilst the balance of convenience remains undetermined, as for instance, where the plaintiff's witnesses reside in one county and the defendant's in another (*O'Neill v. The Trustees of the Limerick Butter Market*, 6 Ir. Jur. N. S. 134; *Doyle v. Hammond*, 6 Ir.

Jur. O. S. 306; *Blackman v. Bainton*, 15 C. B. N. S. 432). The Court may, however, in such a case, change the venue to an intermediate county (*Bumford v. Greuler*, 6 Ir. Jur. N. S. 392). The defendant may lose his right to change the venue on the grounds just mentioned, by doing acts calculated to prejudice the plaintiff with the class of persons who would, in all probability, be upon the jury panel in the county to which it is proposed to change the venue (*Wilson v. Thompson*, 1 Ir. Jur. N. S. 187).

Where balance of convenience, or undetermined.

If it be necessary that the jury should view the premises, &c., in dispute, that fact will weigh strongly with the Court upon a motion to change the venue (*M'Donnell v. Carr*, Hayes, 375); but the necessity for a view jury must be shown (*M'Loughlin v. Royal Exchange Assurance Co.*, 9 Ir. L. R. 510; *Walshe v. Murray*, 1 Huds. & B. 10).

Where view jury necessary.

The Court will also, as above mentioned, change the venue in cases where a trial can be more properly had elsewhere than in the venue as laid. As a general rule, the Court will, however, be slow in listening to allegations of the existence of political feeling or prejudice as a reason for a change of venue (*Dowling v. Sadleir*, 3 Ir. C. L. R. 603); or of the plaintiff's influence with the persons likely to serve on the jury (*Prosser v. Cuddy*, 1 Ir. Jur. N. S. 205; *Crooke v. Rice*, 6 Ir. Jur. N. S. 398). If, however, there be reason for believing that the jury might be influenced by one of the parties to the suit, the Court will change the venue (*The Town Commissioners of Enniskillen v. The Earl of Enniskillen*, 12 L. R. 36). And in case where the venue has been changed on the application of the defendant, and an abortive trial had at the place to which it has been changed, the Court will bring back the venue to where it was originally laid, if there be reason for believing that a satisfactory trial cannot be had in the first mentioned place (*Kelly v. Londonderry and Enniskillen Railway Co.* 3 Ir. Jur. N. S. 392; *Atkinson v. Mills*, 8 Ir. Jur. N. S. 153). So also the Court will permit the plaintiff to change a venue selected by himself when it appears that in consequence of delays arising from the defendant's conduct, or even from accidental causes the plaintiff will be late in going to trial unless the venue be changed (*Jennings v. Lindsay*, 6 Ir. Jur. O. S. 81; *Frazer v. Edwards*, 5 Ir. C. L. R. 540). As to the plaintiff changing the venue in other cases, see *Enright v. The Promoter Insurance Company*, 7 Ir. Jur. N. S. 153; and as to the costs in such a case, see *infra*. Where a plaintiff deliberately selects a venue he will not, in general, be allowed to change it afterwards (*Shea v. Adams*, Ir. R. 1 C. L. 450).

Where trial can be more properly had elsewhere.

Political feeling.

Plaintiff's influence.

Re-changing venue.

Plaintiff changing his own venue.

A motion to change the venue should not be made before defence filed (*Wilson v. Bragg*, 8 Ir. Jur. N. S. 256); when the defence is filed, it may be made, although issue has not been joined (*Kennedy v. Lynch*, 10 Ir. C. L. R. Ap. 44; *Dowler v. Collis*, 4 M. & W. 531), with which compare *The Guardians of the Foughal Union v. Atkinson*, 9 Ir. C. L. R. App. 17. But where two of three defendants had taken defence, the third being out of the jurisdiction, the Court refused, with costs, an application by the two who had taken defence to change the venue (*Corah v. Ward*, 13 Ir. C. L. R. Ap. 42). A motion by the defendant to change the venue will be heard when the defendant has lodged his defence, and the assizes are close at hand, though the summons and plaint has not been filed (*Egan v. Vesey*, 7 Ir. Jur. N. S. 323). It should be made within a reasonable time, so that the plaintiff may not be delayed in going to trial more than is necessary (*Quin v. Quin*, 1 Ir. L. T. 404; *Walsh v. Hopkins*, lb. 26).

When motion may be made.

The affidavits in support of the application should set forth the facts Affidavits.

relied upon, and where the change of venue is sought upon the ground of the residence of witnesses, the affidavit should state specifically who the proposed witnesses are, where they reside, that the plaintiff intends to examine them, and that their evidence is material (*Donnelly v. Darcy*, 2 Ir. Jur. N. S. 187; *Busteed v. Raymond*, 7 Ir. Jur. O. S. 22; *Gibbings v. O'Dell*, 1 Ir. L. T. 369).

Costs.

When a defendant succeeds in a motion for change of venue, the costs of both sides are generally made costs in the cause; when the defendant fails he gets no costs, and the plaintiff's costs are made costs in the cause (*Shaw v. Harris*, 7 Ir. Jur. O. S. 111; *Prosser v. Cuddy*, 1 Ir. Jur. N. S. 105); or if the motion was clearly untenable, the defendant may be ordered to pay them (*Corah v. Wurd*, 13 Ir. C. L. R. Ap. 43; *Wilson v. Bragg*, 8 Ir. Jur. N. S. 256). Where the venue is changed upon the plaintiff's application he will generally have to bear the costs of the motion (*Arkins v. Barnard*, 15 Ir. C. L. R. Ap. 2), including the defendant's costs of appearing (*Comerford v. Daly*, 11 Ir. C. L. R. Ap. 62). But in cases where the plaintiff is clearly entitled to change the venue, the defendant will not get the costs of opposing the motion (*Arkins v. Barnard*, *ubi supra*).

How change effected.

When the venue is changed in a personal action, the change is effected by an amendment of the summons and plaint. In actions of ejectment the change is effected by entering a suggestion upon the record.

Amending generally.

When a plaintiff is allowed to "amend as he may advised," he may change the venue as originally laid (*Costello v. Woods*, 11 Ir. C. L. R. App. 31).

Setting out of deeds in pleading.
15 & 16 Vict.
c. 76, s. 55.

63. It shall not be necessary for any party, in his summons and plaint or defence or other pleading, to set forth more of any deed or document than such parts thereof as are material to his action or defence, or the purport and effect thereof; and it shall not be necessary to make profert of such deed or document, and if profert be made it shall not entitle the opposite party to craveoyer of or to set out uponoyer such deed or other document (u).

Profert andoyer.

(u) Formerly, when a party in his pleading relied upon a deed to which he was a party, he was obliged, with certain exceptions, to make *profert* of it, and thereupon the opposite party might crave *oyer*, and set out the deed, which became then a part of the pleading of the party relying on it, and the opposite party might, if so advised, demur. The above section, however, having abolished *oyer*, it was for some time after the passing of the Act a matter of doubt whether the Court could, on the argument of a demurrer, refer to a deed relied on by the party whose pleading was demurred to, and found its judgment on the actual terms of the deed itself, in place of on the terms of it as set forth in the pleading. It was, however, decided by the Court of Exchequer in *The Guardians of Nenagh Union v. Armstrong* (not reported, but referred to in the case next mentioned), that the Court had, under this and the next section of the Act, power to do so, and, accordingly, in that case, which was an action upon a bond, to which a defence was pleaded, and a demurrer taken to the defence, the Court in giving judgment upon the demurrer, founded its judgment on parts of the bond not set forth in the

Present practice as to documents relied on in pleadings.

pleadings; and in *Armstrong v. Turquand*, 9 Ir. C. L. R. 32, the Court of Common Pleas adopted a similar course. Accordingly the rule now is that, where a party in pleading relies upon any deed or document, in his possession, the opposite party has a right to call for its production, and when produced, he may, if so advised, demur to the pleading, incorporating in his demurrer the document produced, and the document, being afterwards produced upon the argument of the demurrer, and being marked by the officer of the Court, the Court will found its judgment upon the actual terms of the document in question.

The rule in question is applicable not merely to deeds, but to all other documents and instruments in writing—as, for instance, where the document relied on is a magistrate's warrant, enabling a road contractor to enter the lands of a third party and take stones, pursuant to the 162nd section of the Grand Jury Act (*Fitzpatrick v. Fine*, 13 Ir. C. L. R. 32).

The cases just referred to must, however, be carefully distinguished from those cases where the document relied on is not in the possession of the party pleading. In the first class of cases no embarrassment can arise from the course adopted. The party pleading is not prejudiced because the judgment of the Court proceeds upon the very document relied on by him. Nor is the party demurring prejudiced, because, when the document is produced, he may, if he choose, in place of demurring, plead or take issue, and so dispute the validity in point of fact of the document produced. If, however, the document is not in the possession of the party relying on it, and is not accordingly produced by him, the opposite party cannot set out the document in question in his pleading, and then demur. To allow him to do so would be to deprive the other side of the means of showing that, in point of fact, the document so set forth was not the document relied upon, and, accordingly, when the document in question is in the possession of the party demurring, a pleading incorporating the document, and then demurring, will be set aside as irregular (*Maher v. Purcell*, 13 Ir. C. L. R. 133). In that case, however, the Court intimated that if the parties had consented that the document so set forth should be treated as the document relied on, the case would then be same in effect as *Armstrong v. Turquand*.

As to the corresponding English practice, see *Sim v. Edmonds*, 13 C. B. 240.

64. When any party shall rely on any deed or document, or any portion thereof, in his pleading, the said deed or document shall be produced upon every trial and argument in the cause, unless its nonproduction can be satisfactorily excused; and in default thereof it shall be lawful for the Court or Judge before whom such trial or argument shall be had to exclude the said party so in default from all benefit or advantage of the said deed or document, or to make such order for the postponement of the trial or argument, and the payment of the costs occasioned by the said postponement, as shall seem to be just (*v*); and the opposite party shall be at liberty, by notice in writing, to demand of the party so relying on the said deed or document an inspection or copy, or both

Where document not in possession of the party relying on it.

Production, inspection, and copy of deeds.
15 & 16
Vict. c. 76,
s. 56.

an inspection and copy of the same, including the names of the witnesses by whom it was attested, if any, and any endorsement or defeasance thereon, and the production of it for the purpose of its being stamped, if necessary, and also the production, inspection, or copy of any other deed or instrument whereof inspection could be obtained by a bill of discovery; and such copy, when furnished, shall be certified to be a correct copy by the attorney furnishing the same; and in case such copy shall not be delivered, or such inspection or production shall not be granted, the party demanding the same shall not be at liberty to apply to the Court or a Judge for an order for such copy or inspection or production, or copy and inspection and production, as such Judge shall think fit (w), but such demand, notice, or order shall in no case operate as a stay of proceedings, except when a special order shall be made by a Judge to that effect (x).

(c) As to the effect of this provision in conjunction with the preceding section, see the last note.

Inspection of documents.

(w) As a general rule inspection will be granted of any deed of which, if it were not for the Act, probert must have been made (*The Penrith Harbour, &c., Co. v. Cardiff Waterworks Co.*, 7 C. B. N. S. 816). As to the discovery, inspection, and production of documents other than those relied on in pleading, further powers are given to the Court by section 55 of the C. L. P. Act, 1856 (which see.; and several of the cases in which the Court has ordered the production of such documents will be found referred to in the notes thereto.

How far notice to produce a stay of proceedings.

(x) By the 57th G. O., 1854, it is provided, that "when any party shall have served a notice, requiring a copy of any deed or document, he shall have the same time for filing his pleading after compliance with such notices as had at the time of service thereof; such time to be in no case less than twenty-four hours." The effect of this Order, taken in conjunction with the closing part of the section we are considering, was discussed in *Boyd v. Nethery*, 10 Ir. C. L. R. 369, where it was held that a judgment marked after service of a notice to produce a document, but before compliance, was perfectly regular, and the Court, in giving judgment, stated that the construction of the rule was, that where notice has been served to produce documents, if that be complied with by the opposite party before the time for pleading has expired or judgment marked, the date of the service regulates the time which the defendant has for pleading, but that in case it was not produced the words of the rule were not intended to repeal the 64th section.

Summons and plaint for libel or slander.
15 & 16 Vict.
c 76, s. 61.

5. In actions of libel and slander the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such alleged defamatory sense, without any prefatory averment to show how such words or matter were used in that sense (y).

(y) Formerly in actions of slander and libel, when the words used did not state in direct terms that which by the law was in itself actionable, it was necessary to show in the declaration how they came to bear the meaning attributed to them in the innuendo; and if the words with the meaning so attributed to them were not *per se* actionable, it became further necessary to state the circumstances rendering them such, as, for instance, that the plaintiff was a trader, and the words were spoken of him in reference to his trade. By the above section, however, it is now unnecessary to state the facts showing how the words were used in the sense attributed to them, and accordingly the question whether the words complained of are capable of bearing the sense put on them by the innuendo is one altogether for the jury, and cannot be decided by the Court upon demurrer (*Currihan v. Ryan*, 11 Ir. Jur. N. S. 406; *Pearson v. Smith*, 7 Ir. Jur. N. S. 275; *Hemmings v. Gasson*, E. B. & E. 346); and the earlier case of *Lavelle v. Oranmore*, 9 Ir. Jur. N. S. 55, in which a demurrer to a plaint was allowed upon the ground of the innuendo being too large, must be considered as overruled. In fact, the judgment in that case was afterwards reversed upon appeal by the Exchequer Chamber (*Currihan v. Ryan*, *ubi supra*, per O'Brien, J.).

Old law.

New law.

Innuendo a question for the jury.

When the words were alleged to have been spoken of the plaintiff in his trade, the Court of Exchequer held upon demurrer that the circumstances showing that the words were so used, or were capable of being so used, should be shown (*McDougall v. Tyrrell*, 1 Ir. Jur. N. S. 465).

When the innuendo is not defamatory, there is nothing, of course, in the Act to prevent the defendant from demurring (*Mawe v. Pigott*, Ir. R. 4 C. L. 54); and see *Teacy v. McKenna*, Ir. R. 4 C. L. 374.

Where innuendo not defamatory.

The defendant in an action for libel may plead that the words are no libel (*Nixon v. Harvey*, 8 Ir. C. L. R. 446).

66. The plaintiff or defendant in any action may aver performance of conditions precedent generally (z), and the defendant shall not deny such averment generally, but shall specify in his pleading the condition or conditions precedent the performance of which he intends to contest (a).

Performance of conditions precedent may be averred generally. 15 & 16 Vict. c. 76, s. 57.

(z) Formerly the plaintiff and defendant had to aver in their several pleadings the performance of conditions precedent with certainty and particularity, and if they failed to do so the pleading would be bad on demurrer. Under the above section, however, a general averment of their performance is now sufficient, and the defendant must specify, particularly in his defence, any condition, on the breach of which he intends to rely as an answer to the action.

Averring performance of conditions precedent.

The general averment of the performance and happening of all things necessary to the plaintiff's right of action imports in itself a sufficient statement of his being ready and willing to do all things necessary to be done on his part; as, for instance, his readiness and willingness to pay for goods upon delivery, in an action brought for a non-delivery (*Bentley v. Davies*, 9 Ex. 666). It also amounts to a sufficient averment of a demand having been made whenever such was necessary (*Newry and Armagh Railway Co. v. Ulster Railway Co.*, Ir. R. 4 C. L. 62). As to what it will not amount to, see *Bloomer v. Darke*, 2 C. B. N. S. 165; *Foscard v. Mugnier*, 18 C. B. N. S. 286; *Wolverhampton Waterworks Co. v. Hawkesford*, 6 C. B. N. S. 336.

What is imported by a general averment.

What it
should aver.

When a plaint contained a general averment of the performance of conditions precedent, and then went on to aver the performance of a particular condition, the Court, under the circumstances, considered the pleading to be embarrassing (*Chambers v. Soden*, 1 Ir. Jur. N. S. 79); and see *Millward v. Robinson*, 10 Ir. Jur. N. S. 148.

Excuse for
non-perfor-
mance.

Where a condition has not been performed, and the plaintiff relies upon a waiver, or other matter of excuse, he should not plead performance generally, but should set out with particularity the condition excused, and the excuse of performance (Bull & L. Pr. Pl. 2nd ed. p. 125).

How non-
performance
pleaded.

As a general rule, when the plaint or defence contains a general averment of the performance of conditions precedent, the defendant or plaintiff must specify particularly in his defence or replication any condition on the breach of which he intends to rely. It has, however, been held, under the corresponding English section, that when a defendant averred in his plea performance of conditions precedent generally, a general replication was a sufficient traverse by the plaintiff of the performance of any particular condition precedent on which he relied (*Tetley v. Wanless*, L. R. 2 Ex. 21, 25, per Bramwell, B.). Such an issue would not, however, if objected to, be allowed in this country.

Giving in
evidence
under gene-
ral traverse.

As to giving in evidence, under a general traverse of the making of the contract, the breach by the plaintiff of a condition precedent not set forth in the plaint, giving the defendant a right to rescind the contract, see *Kenyon v. Tayleur*, 8 Ir. C. L. R. Ap. 76.

The process
or adjudica-
tion of an
inferior juris-
diction may
be pleaded
generally.

67. In pleading any process, decree, judgment, or adjudication of a court or officer of special or inferior jurisdiction, it shall not be necessary for the party pleading or relying on such process or adjudication to state in his pleading the facts or matters conferring jurisdiction on such court or officer to entertain the question, or issue such process, or make such adjudication, but the same respectively may be stated in such pleading to have been duly entertained or made by such court or officer; and if such statement be controverted, the party so pleading or relying on such process, decree, judgment, or adjudication shall on the trial establish by proof the facts and matters necessary to confer jurisdiction on such court or officer to entertain the question, or issue such process, or make such adjudication so pleaded as aforesaid (b).

Pleading pro-
cess of inferior
Court.

(b) Formerly the rule was, that where a justification was founded on process issuing out of an inferior Court, or, as it would seem, a Court of foreign jurisdiction, the nature and extent of the jurisdiction of such Court ought to be set forth; and it ought to be shown that the cause of action arose within that jurisdiction; though a justification founded on process of any of the superior Courts need not contain such allegations. Steph. Pl. 6th. ed., p. 254. The process of a Court or officer, of special or inferior jurisdiction, may now, however, under the above section, be pleaded without setting forth the facts conferring jurisdiction; and it has been held that the award of the public arbitrator appointed in pursuance of the provisions

Of superior
Courts.

Award of a
public arbi-
trator.

of the Railway Act (Ireland) 1851, is an "adjudication" within the meaning of the section, and that a general averment of his authority is sufficient (*Lockhart v. Irish N. W. Rly. Co.*, 14 Ir. C. L. R. 385).

68. All facts stated in any summons and plaint, and not denied in the defence, shall be deemed to be admitted for the purpose of the suit; and in actions by and against assignees of a bankrupt or insolvent debtor, or executors or administrators, or persons authorized by Act of Parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated to sue or be sued shall not in any case be considered as in issue, unless specially denied (c).

Facts not traversed admitted. Character of assignees to be taken as admitted, unless denied.

(c) By the operation of this section, all *material* facts stated in the summons and plaint are generally deemed to be admitted, unless traversed in the defence.

Thus, where the defendant in an action upon a guarantee pleaded that there was no consideration for the making of the promise declared on, it was held that he was precluded by the above section from giving in evidence at the trial a document containing a guarantee differing from that relied on in the plaint (*Jefferyes v. Lysaght*, 6 Ir. C. L. R. 40). And see further as to the effect of an admission arising from pleading over, *Adams v. Atkinson*, 9 Ir. C. L. R. Ap. 18; *King v. Walker*, 3 H. & C. 209.

How far defendant concluded.

There are, however, some matters as to which no issue is raised upon the record, but which the plaintiff must be prepared to prove at the trial. Thus, where an action is brought by a medical man for professional services, he must be prepared to prove at the trial that he is duly registered, pursuant to 21 & 22 Vict. c. 90, s. 32, and it would be premature for the defendant to rely upon the non-registration in his defence (*Haffield v. McKenzie*, 10 Ir. C. L. R. 289). Where, however, an action is brought against a Justice of the Peace for acts done in the execution of his office, he cannot, at the trial avail himself of the provisions of the 12 Vict. c. 16, requiring the service of a notice of action, unless the want of such notice has been pleaded (*Lawrenson v. Hill*, 13 Ir. C. L. R. 1, in the Ex. Cham. reversing the decision of the Court of Exchequer, reported 10 Ir. C. L. R. 498).

What facts must be proved though not in issue.

Notice of action.

69. So much of any Act of Parliament as entitles or permits any person to plead the general issue only, and to give special matter in evidence, without pleading the same, is hereby repealed, except as to pending actions; provided always that in any case in which a defendant by any Act of Parliament is now enabled to plead a plea of tender or other matter, together with a plea of the general issue, such defendant may plead the like matter separately or with any defence under this Act (d).

General issue by Statute abolished.

(d) The provisions of this section do not apply to cases where a defendant is enabled, under a statute passed since the date of the present Act, to plead

General issue by Statute.

the general issue and give special matter in evidence thereunder. As to the form of the defence in such a case, see *Murphy v. Fielding*, 17 Ir. C. L. R. 375. And see, further, as to the operation of this section, *Boake v. McCracken*, 6 Ir. C. L. R. 266, per Monahan, C. J.

Defence by way of denial to traverse some particular fact.

Defences which admit a contract in fact to be pleaded specially.

70. In actions upon contract, every defence by way of denial must traverse some one, or more than one, material matter of fact, as, for instance, the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonor of a bill or note; and every defence which admits a contract in fact, but relies upon matter of avoidance or discharge, or illegality on the ground of fraud or otherwise, as, for instance, infancy, coverture, release, payment, or performance, illegality of consideration, either by Statute or common law, drawing, indorsing, accepting bills or notes by way of accommodation, set-off, mutual credit, misrepresentation, concealment, deviation, shall be so expressly pleaded (e).

General issue.

(e) Under this and the next section the general issue is abolished, and the defendant required to state specifically in the defence his answer to the action.

In an action for goods sold and delivered, or goods bargained and sold, the defendant will be at liberty, under a defence traversing the contract, to prove that the sale was by sample, and that the goods delivered were not of the same quality as the sample, or that the contract was made on certain conditions, and not complied with; and it would appear that in such a case a special defence is unnecessary (*Mosely v. M'Mullen*, 6 Ir. C. L. R. 69; *Boake v. McCracken*, *ibid.*, 259; *Kenyon v. Tayleur*, 8 Ir. C. L. R. 75). As to the form of the defence, see sects. 36, 81, and 83, and the notes thereto.

A traverse of an allegation in the plaint, in the words of the allegation, is in general sufficient (sect. 83, *post*, note (w)). Where, however, an action is brought upon a promissory note, a defence that the defendant did not promise as alleged will be set aside (*Smyth v. Scott*, 8 Ir. C. L. R. Ap. 35; *Robinson v. Young*, 3 Ir. Jur. N. S. 228). And see *M'Gloin v. Bell*, Ir. R. 2 C. L. 126.

A denial of a contract lets in proof that it was void or not enforceable under the Statute of Frauds (*Goodman v. Griffiths*, 1 H. & N. 574).

Pleas in actions for wrongs.

71. In actions for wrongs, defences by way of denial shall take issue on some one or more than one material matter of fact alleged in the summons and plaint; and all defences which admit the matter complained of, but rely on matter of avoidance, excuse, or justification, shall be so expressly pleaded (f).

(f) See *Segrave v. Earber*, 5 Ir. C. L. R. 67.

A defence cannot both traverse and also confess and avoid an allegation,

in the plaint (*Dunne v. O'Grady*, 5 Ir. C. L. R. 450), in which case a defence to an action of slander, which set forth that the words complained of were spoken upon a privileged occasion, and also that they were not spoken in the defamatory sense alleged, was held to be bad. And see, further, as to the requirements of pleadings in actions of tort, sect. 83, *post*, note (w).

72. A defence arising after the commencement of the action shall be pleaded according to the fact (g); and any defence which does not state whether the matter therein relied upon arose before or after action shall be deemed to be a defence of matter arising before action (gg).

Defence of matter subsequent to action. 15 & 16 Vict. c. 76, s. 68.

(g) If the rights of the parties are altered subsequently to the commencement of the action, the new matter must be pleaded by the party desirous of obtaining the benefit of it, as otherwise it cannot be given in evidence, even in mitigation of damages (*Rundle v. Little*, 6 Q. B. 174, 178).

Formerly, the defendant was never allowed to plead a plea in bar of the further maintenance of the action, together with pleas in bar of the action generally (*Suckling v. Wilson*, 4 D & L. 167). In England, however, by the R. G. Pl. T. T. 1853, r. 22, such pleas may be pleaded together; but when so pleaded, the plaintiff is allowed to confess the plea to the further maintenance of the action, and he thereupon becomes entitled to the costs of the cause up to the time of pleading the plea. There is no corresponding rule in this country. (See *Newton v. Blunt*, 3 C. B. 675).

When it may be pleaded with other matters.

When a defence to the further maintenance of the action is pleaded, care must be taken to confine it to so much only of the plaintiff's demand as it is an answer to. If pleaded generally, it must be an answer to the costs of the action, as well as to the original demand; and in an action of debt it must be an answer to the damages, as well as to the debt; and if not, being bad in part, it is bad altogether (*Goodwin v. Cramer*, 18 Q. B. 757; *Ask v. Poupeville*, L. R. 3 Q. B. 86). When pleaded so generally as to answer the costs, it can only be supported at the trial by evidence of a payment or other defence involving a satisfaction of the costs (*Cooke v. Hopewell*, 11 Ex. 555). The question whether the sum received was accepted in satisfaction of debt and costs is one for the jury (*Henderson v. Hayter*, 2 F. & F. 128).

What it should be confined to.

One of the most usual matters of defence arising after the commencement of the action is payment of the plaintiff's demand by the defendant, or a compromise of the action entered into between plaintiff and defendant. If such a compromise be entered into collusively and fraudulently for the purpose of depriving the plaintiff's attorney of his costs the Court will interfere to compel payment of the costs (*Swain v. Senate*, 2 B. & P. N. R. 99; *Gould v. Davis*, 1 C. & J. 415). But unless the fraud and collusion be clearly shown the court will not interfere (*Glendon v. O'Donoghue*, 10 Ir. Jur. N. S. 232; *Colville v. Hall*, 10 Ir. Jur. N. S. 261; *Clark v. Smith*, 6 M. & G. 1051). And where a plaintiff accepted payment of the debt without costs, on a false representation by the defendant that he was in embarrassed circumstances, it was held that the court could not afterwards, on motion, order him to pay the costs up to the date of payment (*Garratt v. Quinn*, Ir. R. 2 C. L. 251).

Payment after action.

(gg) Formerly it was necessary to show in a plea that the matter of

How pleaded. defence arose before suit, but now by the provisions of the above section, it is unnecessary to do so. Neither is it necessary, where the matter of defence has arisen after action brought, that it should be formally pleaded to the further maintenance of the action (*Gresty v. Gibson*, L. R. 1 Ex. 112). It is sufficient, if it appear from the facts stated in the defence, that the matter pleaded arose after the issuing of the writ (*Brooks v. Jennings*, L. R. 1 C. P. 476; *Tetty v. Wanless*, L. R. 2 Ex. 21).

Defence of matter subsequent to last pleading, how to be pleaded.
15 & 16 Vict. c. 76, s. 69.

73. In cases in which a plea *puis darrein continuance* has heretofore been pleadable in Banco or at Nisi Prius, the same defence may be pleaded with an allegation that the matter arose after the last pleading, and such defence may, when necessary, be pleaded at Nisi Prius; but no such defence shall be allowed unless accompanied by an affidavit stating that the matter thereof arose within eight days next before the pleading of such defence, unless the court or a judge shall otherwise order (*h*).

Defence *puis darrein continuance*.

(*h*) When matter of defence, whether in bar or in abatement, arises after the last pleading, the defendant, if he wishes to avail himself of it, must in general, place it upon the record: note (*g*) *supra*. The bankruptcy or insolvency of the plaintiff or defendant since the last pleading is an instance of a defence *puis darrein continuance*. As to pleading such a defence see sect. 162, *post*. Several other instances of pleas *puis darrein continuance* may be found in the books. Thus, in an action against an executor, the defendant may plead a judgment recovered against him after plea pleaded (*Prince v. Nicholson*, 5 Taunt. 333).

How pleaded.

A plea *puis darrein continuance* is subject to the same rules as to the necessity of being confined to so much of the plaintiff's demand as it is an answer to, and as to the nature of the matter which will support it as the defences dealt with in the last section. It is, in fact, only a particular species of defence of matter arising subsequent to action.

When to be pleaded.

A plea *puis darrein continuance* may be pleaded at any time before the jury have actually delivered their verdict; and, if pleaded at Nisi Prius, it is imperative on the Judge to receive it, provided it is good in point of form, and accompanied by the proper affidavit (*Ludlow v. Tyler*, 7 C. & P. 537). And this is the case even where the plea is clearly bad on the face of it (*Paris v. Salkeld*, 2 Wils. 137).

Its effects.

A plea *puis darrein continuance* operates as a waiver of all former defences (*Ginty v. Costello*, 1 Jones, 17); and, if pleaded after a demurrer, the party so pleading it abandons the demurrer (*Solomon v. Graham*, 6 E. & B. 609). In England, when such a plea is pleaded, the plaintiff is entitled, under the R. G. Pl. T. T. 1853, r. 23, to confess the plea; and he thereupon becomes entitled to the costs of the cause up to the time of pleading it. But in this country there is no corresponding enactment or rule; and, unless the plaintiff succeeds upon the plea *puis darrein continuance*, he will not be entitled to the general costs of the cause (*Newton v. Blunt*, 3 C. B. 675, 681). If the defendant succeeds upon the plea, the only costs he is entitled to are the costs of and subsequent to the plea (*Lyttleton v. Cross*, 4 B. & C. 117). As to the plaintiff's right to discontinue without payment of costs, see *Wollen v. Smith*, 9 A. & E. 505.

Costs.

When such a defence is pleaded at *Nisi Prius*, it must be certified on the back of the record, and returned to the Court, when the plaintiff may reply or demur, as in other cases; but it cannot be replied to at *Nisi Prius* (*Pascall v. Horsley*, 3 C. & P. 372). When pleaded at the assizes, the affidavit verifying it should be sworn before the Judge (*Bartlett v. Leighton*, 3 C. & P. 408).

74. Payment, whether before action brought or when made into Court, shall not, in any case, be allowed to be given in evidence in reduction of the amount to be recovered without being pleaded (i).

Payment not to be proved in reduction of amount without plea.
R. G. 11.
T. T. 1853,
r. 14.

(i) As to indorsing particulars of payment, see *ante*, sect. 11 & 41.

When the plaintiff gives credit for any payment in his indorsement of particulars, such payment need not be pleaded (42 G. O. 1854). In all other cases payment must be specially pleaded; and, if not so pleaded, it cannot be given in evidence, even in mitigation of damages (see the reason for this rule, *Speck v. Phillips*, 5 M. & W. 282, per Alderson, B.). And accordingly, where an action was brought against a surety for the amount due upon a guarantee, it was held that he could not give in evidence, in mitigation of damages, a payment made by a co-surety, such payment not having been pleaded (*Lawrie v. Scholefield*, L. R. 4 C. P. 623).

Action upon a guarantee.

Guarantee.

75. Any defendant in any personal action whatsoever (j), except actions for assault and battery (k), false imprisonment, libel (l), slander, malicious arrest, or prosecution, criminal conversation, or debauching the plaintiff's daughter or servant, and in any proceeding by *scire facias* or writ of revivor to have execution of any judgment, may pay into Court a sum of money by way of compensation or amends, or in discharge of the plaintiff's demand, or upon any defence of tender; and such payment shall be made by lodging the money in the Bank of Ireland on behalf of the defendant who shall make such lodgment, with the privity of the Master of the Court, and to the credit of the cause; and such Master, on the certificate of such lodgment being delivered to him, shall give a receipt for the amount in the margin of the defence.

Payment of money into Court.
15 & 16 Vict.
c. 76, ss. 70,
72.

(j) This and the next three sections enable the defendant in any personal action whatsoever, with the exceptions specified, to pay money into Court by way of compensation or amends.

Notwithstanding the general words of the section, there are, however, some cases besides those specified in which a defendant cannot pay money into Court. Thus, in an action of detainee, the defendant cannot pay money into Court in satisfaction of the value of the goods (*Moore v. Dublin and Meath Railway Co.*, 15 Ir. C. L. R. 140). In such cases, however, if the

In actions of detainee.

plaintiff has suffered no special damage, the defendant will be allowed to return the goods upon payment of costs, and a nominal sum for damages; and if the plaintiff claims any further damages, he will have to continue the action at the risk of costs (*Lyons v. Keller*, 9 Ir. Jur., N. S. 381; *Gallagher v. Nolan*, *ibid.* 382); and see *post*, sect. 80, C. L. P. Act, 1856.

Actions upon bonds.

Again, where an action is brought upon a bond conditioned for the performance of a collateral agreement, the defendant cannot pay money into Court as a defence to the action, the plaintiff being entitled to judgment on the bond as a security for further breaches (*Bishop of London v. M'Neil*, 9 Ex. 490). And where an action is brought upon a money bond within the Statute 6 Anne, c. 10 (Ir.), though the defendant may bring into Court the money due on such bond for principal and interest and the costs, yet such payment cannot be pleaded as a defence to the action; and the defendant's only course is to apply to the Court to stay the proceedings (*England v. Watson*, 9 M. & W. 333). Again, where the defendant in an action of contract traverses the contract stated in the summons and plaintiff, and sets forth in his defence a different contract, he cannot pay money into Court on foot of such different contract (*Duke of Bedford v. Oranmore*, 8 Ir. Jur. N. S. 151; *sed vide Kingsley v. Hackett*, *ibid.* 152, n.).

Where different contract set up by defence.

Cannot be pleaded with other defences.

When pleaded to a portion of plaintiff's demand.

A defendant will not be allowed to plead payment into Court, along with another defence in bar to the action (*Kelly v. Slater*, 7 Ir. C. L. R. 55); with which compare *Ryan v. Roughan*, Ir. R. 4 C. L. 337.

The defendant may pay money into Court in respect of one or more of several counts. So he may in respect of all the counts, and it is not necessary to specify how much is paid to one count how much to another (*Marshall v. Whiteside*, 4 Dowl. 766; *Yorell v. Proby*, Ir. Rep. 2. C. L. 460). Neither will the defendant, as a general rule, be ordered to specify the items of the plaintiff's demand to which his payment is applicable (*Ryan v. Horgan*, 13 Ir. C. L. R. Ap. 34; *Thames Iron Works Co. v. Royal Steam Packet Co.*, 10 C. B. N. S. 375); but where the plaintiff joins several distinct causes of action, particulars may be ordered (*per Erle, C. J., ib.*).

When the defendant has pleaded in bar to the action, he will be allowed upon terms to withdraw his defences in bar, and to pay money into Court (*Brown v. Julian*, 1 Ir. L. T. 156; *Riordan v. Leader*, *ib.* 119).

Effects by way of admission.

A defence of payment into the Court has important effects by way of admission. In such a case where the plaintiff sets forth a special contract, the defence impliedly admits the contract as declared upon, and that the plaintiff is entitled to recover on all the breaches on which it is paid in (*Wright v. Goddard*, 8 A. & E. 144). Where a plaintiff contains only the indebitatus counts, payment into Court admits the defendant's liability to the extent paid in, and it lies upon the plaintiff to establish a liability to any greater extent (*Kingham v. Robins*, 5 M. & W. 94). In actions of tort where the plaintiff is general and unspecific, the payment of money into Court, though it admits a cause of action, does not admit the cause of action sued on; and the plaintiff must give evidence of the particular cause of action before he can have larger damages than the amount paid into Court (*Schreger v. Carden*, 11 C. B. 851). On the other hand, if the plaintiff is specific, so that nothing could be claimed by the plaintiff from the defendant, unless the defendant admitted the particular claim made by the plaintiff, the payment of money into Court admits the cause of action sued for and stated in the plaintiff (*Perren v. Monmouthshire Railway Co.*, 11 C. B. 855).

Evidence upon issue as

When money is paid into Court, the defendant cannot under an issue as

to the sufficiency of the amount paid in, give in evidence any matter which might have been pleaded as a defence to the cause of action. Thus under such an issue in an action for the wrongful dismissal of a servant, he cannot in mitigation of damages prove that he discharged the plaintiff on the ground of drunkenness (*Speck v. Phillips*, 5 M & W. 279).

to sufficiency of the amount.

A defence confessing a portion of the cause of action will not be set aside because the defendant does not bring the amount so confessed into Court (*Tudor v. Furlong*, Ir. R. 3, C. L. 7; *Rutledge v. Davis*, Ir. R. 4, C. L. 202; *Dougan v. Cowden*, *ib.* 339, overruling *Defries v. Stewart*, 11 Ir. C. L. R. App. 18).

Confessing portion of plaintiff's demand.

(k) Where the action is brought for an assault and battery upon plaintiff's servant the defendant may pay money into Court (*Newton v. Holford*, 2 D. & L. 554). But he cannot do so if the assault and battery complained of by the plaintiff, though constructive in its nature so far as the defendant is concerned, has yet been committed upon the plaintiff himself as where an action is brought against a sheriff for an assault committed by his bailiff (*O'Reilly v. Cumming*, 1 Ir. Jur. N. S. 330). And if the defendant in an action for assault pays money into Court, and pleads such payment as an answer to the action, the Court will give the plaintiff liberty to mark judgment (*Brown v. Brown*, 7 Ir. Jur. O. S. 119). The plaintiff in such a case should not demur (*Thompson v. Sheppard*, 4 El. & Bl. 53).

In actions of assault and battery.

(l) In actions of libel where the libel is contained in a newspaper or periodical publication, the defendant is permitted under the 6 & 7 Vict. c. 96, s. 7 (which see), to plead an apology together with the payment of amounts into Court. A defendant will not, however, be allowed under this section to plead a payment into Court with an apology, and also a traverse of the defamatory sense imputed (*Barry v. M'Grath*, Ir. R. 3 C. L. 576).

In actions of libel.

76. At any time before verdict or judgment for the defendant, or peremptory order for payment of costs for not proceeding to trial, the plaintiff may, in any case in which money has been lodged in Court in discharge of the plaintiff's demand(m), or on a defence of tender(n), apply to the Master of the Court to draw on the Bank of Ireland in favour of the plaintiff for the sum lodged by the defendant; and the said Master, on being satisfied by affidavit or otherwise that a verdict, or judgment, or peremptory order for such payment as aforesaid, for the defendant has not been had, shall thereupon draw accordingly; but after verdict or judgment, or peremptory order, aforesaid for the defendant, the money shall remain in Court to answer the defendant's costs, and the plaintiff shall not be at liberty to draw the same unless by order of the Court on motion.

Drawing money so lodged.

(m) A rule to draw money out of court without prejudice to the further prosecution of the action may be obtained in the office, and does not require an application to the Court (*M'Lelland v. Martin*, 6 Ir. Jur. O. S. 246).

Drawing money lodged.

Where plaintiff a lunatic.

Where the plaintiff is a lunatic or person of weak mind, the Court has jurisdiction to order payment of money lodged in an action brought in his name to be made to his wife or other person in whose charge he is living. See *ante*, rect. 50, note (*y*).

Money lodged on defence of tender.

(*x*) Where money is lodged under a defence of tender, it would appear that the plaintiff is at liberty to draw the amount so lodged. By the 49th G. O. 1854, however, if the plaintiff accepts the amount so lodged under a plea of tender in full satisfaction of his demand, the defendant is in the first instance entitled to have his costs deducted out of the amount so lodged.

Taxation of costs where money accepted in full satisfaction. 15 & 16 Vict. c. 78, s. 78.

77. In case the plaintiff shall accept the amount lodged in full satisfaction of his demand, the receipt for the money given to the master shall state that it has been so accepted (*o*), and the plaintiff's costs of suit shall be taxed and ascertained by the proper officer; and in case of nonpayment thereof, within forty-eight hours after taxation and demand, the plaintiff shall be at liberty to enter a peremptory order for payment of his costs of suit so taxed, and for such further sum as shall be fixed by the taxing officer, subject to the approval of the three chief judges of the said courts, as and for his costs of obtaining such order (*p*).

Effect of accepting money in full satisfaction.

(*o*) When the money lodged upon a defence to one of the counts in the summons and plaint is accepted by the plaintiff in full satisfaction of his demand under that count, that count is to be afterwards considered as struck out, and should be wholly excluded from consideration on a motion in arrest of judgment as to the other counts (*Richardson v. Corcoran* 7 Ir. C. L. R. 121).

(*p*) The costs of obtaining a peremptory order for the payment of costs, pursuant to this section, has been fixed at the sum of £1 1s., by a G. O. of the 1st February, 1854.

Issue to try sufficiency of payment when declined. 15 & 16 Vict. c. 78, s. 78. R. G. H. T. 1853, r. 12.

78. In case the plaintiff declines to accept the sum paid into court to satisfy the claim of the plaintiff in respect of the matter to which the plea is pleaded, the sufficiency of the payment shall be tried upon the issue raised for that purpose by the said defence, and in case of such issue being found for the defendant, the defendant shall be entitled to judgment and his costs of suit (*q*).

Costs where plaintiff declines to take money in full.

(*q*) Where the plaintiff in the first instance took out the money on account, but afterwards elected to take it in full satisfaction, the defendant was held to be entitled to all costs incurred after the lodgment of the money so accepted, including the costs of a motion to change the venue (*Lindsay v. Crotty*, 1r. R. 1 C. L. 731); and so also where the plaintiff delayed taking out the money in full satisfaction, the defendant was held entitled to his costs subsequently incurred (*Quin v. Gray*, 1b. 223; *Brown v. Julian*, 1r. R.

L. T. 156). Where the money paid into Court is found to be sufficient, upon an issue raised for the purpose of trying its sufficiency, the defendant is entitled to his full costs of suit, without any deduction by the plaintiff in respect of his costs up to the lodgment (*Farmer v. Fottrell*, 8 Ir. C. L. R. 228); with which case compare *Harold v. Smith*, 29 L. J. Ex. 141. As to the evidence admissible upon such an issue, see *ante*, p. 73.

Costs where issue found against plaintiff.

The section does not, however, apply to actions of ejectment for non-payment of rent and in such cases if the defendant succeeds upon an issue as to the sufficiency of the amount paid in, he is entitled to so much only of his costs, as were incurred subsequent to the lodgment (*Lane v. Lane*, 4 Ir. C. L. R. 268).

In ejectment.

79. Any defence which shall be good in substance shall not be objectionable on the ground of its treating the summons and plaint as framed either for a breach of contract or for a wrong (*qq*).

Pleas to actions partaking both of breach of contract and wrong.

(*qq*) See *Boorman v. Brown*, 3 Q. B. 511; 11 Cl. & Fin. 1; *Gurrett v. Ramidge*, 3 East, 62.

With respect to objections to pleadings for formal and other matters :

Objections by demurrer.

80. Either party may object by demurrer to the pleading of the opposite party, for that such pleading does not set forth sufficient ground of action, defence or reply, as the case may be; and every such demurrer shall state concisely and explicitly the legal points or objections to be relied on, and may be according to the Form No. 3. in the schedule B. to this Act annexed; and to such demurrer there shall be no further pleading (*r*).

Objections by demurrer, 15 & 16 Vict. c. 76, s. 53.

(*r*) This and the next two sections deal with cases where a party wishes to object to the validity in point of law of the pleading of the opposite party.

When a party demurs, his first step is to file his demurrer, and serve a copy on the opposite side. The demurrer must state the points or objections to be relied upon. When the demurrer is filed, the next step is to make up and lodge the demurrer books, pursuant to the 50 & 51 G. O. of 1854, which see. When the demurrer books have been lodged, they remain in the office of the Clerk of the Rules for two days, for the examination of the opposite party; and after the expiration of that period, a side-bar rule may at any time be entered by either party to set down the case for argument, when it will come on in its turn. The requirements of the General Orders referred to must be strictly complied with. For the course to be adopted in case they are not complied with, see the notes to the General Orders in question; and as to setting out upon demurrer the documents relied upon in a pleading, see *ante*, p. 62, note (*w*).

Procedure.

Where mistake in copies of the pleadings.

If an incorrect copy of a pleading be delivered, the Court, on the argument of the demurrer, will give judgment according to the pleading on the file and not according to the copy served (*Palmer v. Robinson*, 1 Ir. C. L. R. 354; *Lawless v. Bryce*, Ir. R. 5 C. L. 190); see, however, *Majoribanks v. Daly*, 1 Huds. & Br. 135.

If a demurrer be taken in consequence of an incorrect copy of a pleading having been delivered, the mistake should be corrected while the paper books are lying in the office of the Clerk of the Rules; or the Court may give leave to amend when the demurrer comes on for argument, in which case it may be necessary to apply for leave to amend by a substantive motion; see *Boylan v. Dublin and Belfast Junction Railway Co.*, 4 Ir. C. L. R. 172. In every such case, however, the party delivering the incorrect copy, or his attorney, must pay all costs incurred by reason of the mistake, including the costs of the demurrer, in case the opposite party wishes to withdraw the demurrer, and plead (*O'Connell v. Unthank*, 1 Ir. C. L. R. 352, *Sherlock v. Gibbings*, 2 Ir. C. L. R. 260. And see *ante*, p. 42, note (m). If, however, the party demurring, was aware at the time of so doing, of the variance between the record and the copy, he will not get the costs of the demurrer (*O'Connell v. Unthank*, *ubi supra*).

Frivolous demurrer.

If the demurrer be obviously frivolous, as for instance, if it be taken in consequence of a mere clerical error, it will be set aside (*Berkeley v. Whitley*, 5 Ir. Jur. N. S. 198; *Blake v. Farrell*, 2 Ir. L. T. 718); or set down for argument at once (*Barret v. Daly*, 8 Ir. L. R. 518; *Doolin v. Doolin*, 6 Ir. Jur. N. S. 386). And see sect. 83, *post*, under which the Court has power to set aside a demurrer, so framed as to prejudice, embarrass, or delay the fair trial of the action. So, also, a demurrer may be set aside if taken against good faith (*Cusack v. Cusack*, 1 Ir. Jur. N. S. 49).

Cross demurrers.

In the case of cross demurrers, the right to begin is discretionary with the Court, and will be regulated according to convenience. It is not, as of course, the right of the plaintiff to begin (*West v. Barrington*, 7 Ir. C. L. R. 16). See, however, *Redway v. Sweeting*, L. R. 2 Ex. 400; *Halhead v. Young*, 6 El. & Bl. 312.

Costs.

The party succeeding on demurrer is entitled to his costs, under the 9 Wm. 3, c. 10. and 3 & 4 Vict. c. 105, sec. 59 (*post* in the Appendix, p. c.); and see *ante*, sec. 60.

Pleadings good in substance sufficient. 15 & 16 Vict. c. 76, ss. 50, 51.

81. No objection by way of general or special demurrer for formal matter only shall be allowed, and no pleading shall be deemed insufficient for any defect which could heretofore be objected to only by special demurrer; and wherever issue shall be joined on any demurrer the Court shall proceed and give judgment according to the very right of the cause, without regarding any imperfection, omission, defect in or lack of form; and every summons and plaint and defence or other pleading which shall, with reasonable clearness and distinctness, state all such matters of fact as are necessary to ground the action, defence, or reply, as the case may be, shall be sufficient, and it shall not be necessary that such matters shall be stated in any technical or formal language or manner.

(s) By this section special demurrers and objections, by way of demurrer, for mere formal matters have been abolished, and the Court is required in every case to give judgment according to the very right of the cause. It would not, of course, be possible here to enter into any detailed discussion of what constitutes within the meaning of the section a good ground for demurrer. Such a question is one depending mainly upon the principles of law applicable to each particular case, and accordingly it is proposed to refer here to a few only of the leading cases, showing the general principles on which the Courts have acted since the passing of the Act in giving judgment upon demurrer.

Special demurrers.

Although, before the passing of the Act the rule upon demurrer was, that where a pleading was ambiguous, it was to be construed strictly against the party pleading (and the same rule still prevails in England, see *Wilkinson v. Sharland*, 10 Ex. 724), yet, in this country the Courts have held that since the passing of the Act the rule is otherwise, and the pleading is to be construed in favour of the pleader; in other words, if an allegation in a pleading is fairly susceptible of two meanings, one of which will make the pleading bad and the other good, that construction is to be preferred which will make the pleading good (*Ruckley v. Kiernan*, 7 Ir. C. L. 75, 79, 80; *McKinney v. Irish North-Western Railway Co.*, Ir. R. 2 C. L. 600, 603, per Monahan, C. J.). In the latter case, the action was brought against the defendants for negligence resulting in the death of one of their servants, and upon demurrer it was held by the Exchequer Chamber that the allegation of negligence contained in the plaint should be construed to mean an act of negligence on the part of the defendants themselves, and not an act of negligence on the part of their servants, and that if the defendants were embarrassed by the generality of the pleading, their proper course would have been to have applied to the Court to set the pleading aside, and not to have demurred.

How pleadings construed upon demurrer.

So also where a count upon a bill of exchange omitted to aver, that the defendant did not pay the amount, the omission was held to be cured by the introductory averment of the defendant being indebted (*Pepper v. Kelly*, 5 Ir. C. L. R. 317); with which compare *Shannon v. Brennan*, 2 Ir. Jur. N. S. 188. And the omission of the words, "money payable by the defendant to the plaintiff," has been held not to vitiate an *indebitatus* count for goods sold and delivered (*Gason v. O'Ryan*, 7 Ir. Jur. O. S. 272). In most of the cases referred to, however, the party demurring might have had the pleading amended under section 83, *post*.

Although, however, the Court will, as above mentioned, construe a pleading, whenever it is possible so to do, in favour of the party pleading it, yet the rule only applies where there exists some positive allegation susceptible of the desired meaning, and not where the objection is the absence of proper averments to maintain the pleading (*Magennis v. Dempsey*, Ir. R. 3 C. L. 331). In the latter case there is, in fact, nothing for the rule to act upon. Thus, a count for work and labour, omitting to aver a request, will be bad (*Corah v. Young*, 6 Ir. C. L. R. 138; *McPhail v. Little*, 9 Ir. Jur. N. S. 267). So also a count upon a contract to indemnify which omits to aver that the plaintiff paid the amount sought to be recovered (*Shannon v. Brennan*, 2 Ir. Jur. N. S. 188). And it has been held in numerous cases that where an action is brought for an illegal distress a defence justifying the trespass complained of as a distress for rent will be bad unless it expressly avers compliance with the requirements of the 9 & 10 Vict. c. 111,

Where no averment to sustain the pleading.

Actions for illegal distress.

(*Madden v. Bryan*, 1 Ir. C. L. R. 322; *Naghten v. Kelly*, Ir. R. 1 C. L. 556; *M'Leary v. Davis*, Ir. R. 2 C. L. 234); although a contrary opinion seems at one time to have prevailed (*Brennan v. Flood*, 4 Ir. C. L. R. 332; *Spratt v. Murphy*, 6 Ir. C. L. R. 489). As to when a count in negligence will be bad upon demurrer, see *Smyly v. Glasgow and Londonderry Steam Packet Co.*, Ir. R. 2 C. L. 24; *Collis v. Selden*, L. R. 3 C. P. 495.

When a pleading construed according to the rule just mentioned discloses no cause of action or no answer to the previous pleadings, judgment will, of course, be given upon the argument of the demurrer against the party pleading it; and, this is so in many cases where the objection may appear at first sight to be of a technical nature. Thus a departure is a good ground of demurrer, inasmuch as it leaves the previous pleadings unanswered (*Blood v. Keller*, 11 Ir. C. L. R. 124; *Barry v. Grogan*, Ir. R. 2 C. L. 390; *McKenna v. Moutray*, 8 Ir. Jur. N. S. 233). So also is a misjoinder of plaintiffs or defendants, provided it appears upon the record (*Cahill v. McDowell*, 13 Ir. C. L. R. 481; *Bellingham v. Clark*, 1 B. & S. 332).

Departure.

Misjoinder of parties.

Misjoinder of causes of action.

So also, although the plaint discloses a good cause of action, yet if it be so framed that the judgment of the Court cannot be given upon it, it will be demurrable; as in a case where there is a misjoinder of causes of action (*Nixon v. Quinn*, Ir. R. 2 C. L. 248); or where the plaint seeks to recover for a partial breach only, but shows that the plaintiff is entitled to recover for a breach of the entire contract (*Kingsley v. Hackett*, 14 Ir. C. L. R. 58; *Blount v. Evans*, 5 Ir. C. L. R. 371).

Objections to form of pleading.

Where, however, the objection is only to the form of the pleading, as, for instance, if it be objected to on the grounds of duplicity or argumentativeness merely, the demurrer will be overruled; and if the demurrer be upon merely frivolous grounds, as, for instance, using the word "plaintiff" in place of "defendant," it will be, as before mentioned, overruled or set aside (*Berkeley v. Whitley*, 5 Ir. Jur. N. S. 198); and see *Bush v. Curran*, 9 Ir. C. L. R. Ap. 28.

The Court will give judgment upon the whole record.

On the argument of a demurrer the Court, with a few exceptions, is bound to give judgment upon the whole record, and not merely upon the pleading demurred to, and consequently when a defence is demurred to, the defendant is entitled to fall back on the summons and plaint and show that it cannot be sustained (*Irwin v. Osborne*, 5 Ir. C. L. R. 404); and the fact of the objections relied upon not appearing upon the demurrer books is not sufficient to deprive the defendant of the benefit of them, and, at most, would only entitle the defendant's counsel to an adjournment on the ground of surprise (*Levingston v. Guardians of the Lurgan Union*, 1 Ir. L. T. 778). See, however, *Arbouin v. Anderson*, 1 Q. B. 489; *Bayley v. Homan*, 3 Sc. 384. The exceptions to the general rule are: 1st. When a plaintiff demurs to a plea in abatement. In that case, the Court, if the demurrer be well founded, will (at least such was the practice under the old law) give judgment for the plaintiff without regard to any defect in the plaint; and 2nd. Though on the whole record the right may appear to be with the plaintiff, the Court will not adjudge in favour of such right unless the plaintiff have himself put his action upon that ground: Step. Pl. 6th Ed. p. 134.

Particulars.

Upon the argument of the demurrer, the particulars indorsed upon the plaint or defence cannot be referred to for the purposes of argument (*Sigs-worth v. Farrell*, Ir. R. 2 C. L. 321). As to referring to the documents relied upon in the pleadings, see *ante* sect. 63, note (u).

Where de-

If the demurrer be too large, that is, if some of the matter covered by it

be sufficient in point of law, it would, according to the practice at one time prevailing, have been overruled *in toto*. The practice, however, now in such a case is to give judgment distributively. Thus, where some of the counts in a plaint were good and some bad, a demurrer taken to the entire plaint was allowed as to the bad counts, but overruled as to the others (*Jackson v. Veich*, 3 Ir. Jur. N. S. 201); and a similar course was adopted in *Briscoe v. Hill*, 10 M. & W. 735, and *Black v. Howley*, 3 Ir. Jur. 122; and see the learned note to *Hinde v. Gray*, 1 M. & G. 201, note (a). As to demurring to one portion of a count and pleading to the rest, see *Boyle v. Hammond*, 3 Ir. C. L. R. 579; *Longford v. Oldham*, 4 Ir. C. L. R. 134; and as to aider by pleading over, see *Munbourn v. Wyse*, Ir. R. 3 C. L. 471.

Where the pleadings are imperfect by reason of a discontinuance no judgment can be given upon demurrer (*Brown v. Salmond*, 6 Ir. Jur. N. S. 135). Discontinuance.

82. Judgment on demurrer for the defendant, and also for the plaintiff, in all cases in which the action is for a liquidated or money demand (t), shall be final (w), unless the Court shall give liberty to amend the pleading demurred to, or to plead *de novo* on the argument of the demurrer, or by any subsequent order (v). Judgment on demurrer final.

(t) As to what is a liquidated or money demand, see *post*, sect. 96.

(w) A judgment for the plaintiff upon demurrer is interlocutory or final in the same manner, and in the same cases as a judgment by default. See sects. 98 and 100, *post*.

(v) This proviso would appear to apply only to cases where the pleading demurred to has been held bad, and not to cases where the pleading has been upheld. Giving leave to amend pleading demurred to.

When a defendant applies for leave to amend a defence, bad in point of form or of law, it is discretionary with the Court to grant or to refuse the application, and an affidavit of merits may, therefore, be required (*Bishop v. Wigram*, 7 Ir. Jur. O. S. 22; *Hutton v. Hutchins*, 4 Ir. C. L. R. 234). As a general rule, however, where leave to amend is sought for, more especially if before argument, it will be granted without such an affidavit (*Meyler v. Morton*, 7 Ir. L. R. 229; *Cannon v. Nizon*, Bl. D. & O. 95; *Johnson v. O'Hagan*, Ib. 96, note (b)). Except in cases where leave to amend is given upon the argument, or in giving judgment (*Davies v. Evans*, 5 Ir. Jur. O. S. 274), the application should be upon notice (*Cannon v. Nizon*, *ubi supra*; *Queen v. Bishop of Cork*, 11 Ir. L. R. 114, 147). Where leave to amend is sought for after argument or judgment, the Court will be slow in giving leave to amend, more especially if the party has already refused to amend (*Skuse v. Davis*, 10 A. & E., 635, 640; *Farebrother v. Worsley*, 1 C. & J. 549, 563). As to the amendment of pleadings in general, see *post*, sect. 231.

Where the pleading demurred to has been upheld and the unsuccessful party wishes to withdraw his demurrer the Court may, where the justice of the case requires it, allow him to do so upon terms, and to substitute a defence or other pleading in its place (*Reeve v. Morris*, 3 Ir. L. R. 3; *Bentley v. Dawes*, 9 Ex. 666). As instances of cases where such leave has been Withdrawing demurrer.

refused, see *M. Entry v. Waterford and Limerick Railway Co.*, 8 Ir. C. L. R. Ap. 61; *Birch v. Hurt*, Hayes, 494; *Bramah v. Roberts*, 1 Bing. N. C. 481; and it would follow from the two latter cases that an application for leave to withdraw a demurrer after judgment and to plead, should be accompanied with an affidavit of merits.

As to withdrawing a demurrer before argument, or pending the argument, see 2 Ch. Pr. 12th Ed., p. 927.

Pleadings framed to embarrass may be amended.

83. If any pleading or demurrer be so framed as to pre-judice, embarrass, or delay the fair trial of the action, the opposite party may apply to the Court or a Judge to strike out or amend such pleading, and the Court or a Judge shall make such order respecting the same, and also respecting the costs of the application, as to such Court or Judge shall seem fit (*w*).

Embarrassing pleading.

(*w*) Special demurrers having been abolished, it became necessary to substitute in their place some means by which a party embarrassed by a pleading which would be held good on general demurrer could have it amended or struck out. Accordingly the above section was passed for that purpose. The cases decided under it have been, as might be expected, extremely numerous, and it would not be possible to state them all here. Reference will accordingly be made only to the principal ones.

Where pleading is insensible.

A party may be embarrassed by the pleading of the opposite party in several ways. The pleading may be insensible and repugnant, and, if so, it will be set aside. As, for instance, where in an action for non-delivery, the contract declared upon was stated in the plaint, both as a contract to deliver upon request, and when sent for (*Warren v. King*, 11 Ir. C. L. R. Ap. 10). So also where to an action upon a promissory note, the defendant pleaded that he did not accept the bill of exchange the defence was set aside, and leave granted to mark judgment (*Flood v. Hennigan*, 1 Ir. Jur. N. S. 189). And where a summons and plaint by the public officer of a banking company, who sued in his official capacity, disclosed a cause of action accruing to him in his private capacity only, it was set aside (*Murray v. Comyn*, 11 Ir. C. L. R. 239).

Where pleading ambiguous.

Again, though the pleading be not insensible, the opposite party may be embarrassed by it, as, for instance, if it be ambiguous. In such a case the embarrassment may arise from the pleading being susceptible of one meaning at Nisi Prius, and another upon demurrer. It is true that, in such a case the Court will, upon demurrer, in accordance with the principle of *Ruckley v. Kiernan*, 7 Ir. C. L. R. 75, attribute to the pleading the meaning which will uphold it, and the same meaning will, of course, be attributed to it at Nisi Prius (*Lawrenson v. Hill*, 10 Ir. C. L. R. 177); but, nevertheless upon an application to the Court under this section, such an objection is a fatal one (*Clarke v. Scully*, 10 Ir. C. L. R. Ap. 4; *Franklin v. Walker*, Ir. R. 4 C. L. 236). On the same principle, in an action upon a negotiable instrument, a defence of a contemporaneous agreement not to enforce payment in a certain event, should aver that the agreement was in writing (*Palliser v. Redmond*, 10 Ir. Jur. N. S. 133); and see *Young v. Austen*, L. R. 4 C. P. 553; and where a release can only be by deed, it must be alleged in plead-

ing to be by deed (*Hutton v. Hutchins*, 4 Ir. C. L. R. 234; *Neville v. Hyland*, 3 Ir. C. L. R. 238), in which latter case the action having been brought to recover rent, a defence of an agreement to accept an abated rent was set aside because it was not averred to have been under seal. Compare with these cases *Coey v. Belfast and County Down Railway Co.*, 11 Ir. Jur. N. S. 127; *Egan v. Neill*, 9 Ir. C. L. R. Ap. 9; *Forsyth v. Bristow*, 8 Ex. 347. Similarly, a defence of contributory negligence, which averred that the plaintiff's negligence contributed to the damage, was ordered to be amended by averring that it "directly" contributed (*Lawlor v. Wheeler*, 8 Ir. Jur. N. S. 397). As to the form of a defence of contributory negligence in general, see *Doyle v. Kinahan*, 1r. R. 4 C. L. 150, and the cases there referred to. A plaint complaining of a false representation will be set aside if it does not aver that the representation was false to the knowledge of the person making it (*Crooke v. Powerscourt*, 1 Ir. L. T. 660); and a defence to an action for a false imprisonment, justifying the arrest, was set aside for not containing a positive allegation that a felony had been committed (*Dowd v. Percy*, 9 Ir. Jur. N. S. 140). A pleading will also be set aside on the ground of ambiguity, if the issue in fact arising upon it be ambiguous and uncertain, as, for instance, in the case of a defence, if it be so framed as to leave it uncertain what is intended to be traversed and what admitted (*Smyley v. Kelly*, 5 Ir. Jur. N. S. 321). In that case the plaintiff stated a building agreement, and alleged as a breach certain deviations from the plan, and a defence that everything was done by the defendant according to the terms of the agreement, was set aside as embarrassing. On the same principle, a defence amounting to the general issue will be set aside; as, for instance, a defence to an action for goods sold and delivered, that the defendant "is not indebted" (*Allard v. Banagan*, 3 Ir. C. L. R. 233), or "does not owe" the amount (*Martin v. Roe*, 6 Ir. Jur. O. S. 244); or, that "no money was owing" (*Kennedy v. Kelly*, 17 Ir. C. L. R. 391). As to a defence that the defendant "never was indebted," see *Martin v. M'Hugh*, 6 Ir. Jur. O. S. 279; *Meade v. Morrow*, 4 Ir. C. L. R. 284. Where a plaintiff averred that for certain considerations the defendant "promised," &c., a defence alleging that the defendant "did not promise as alleged," was set aside as amounting to the general issue (*M'Gloin v. Bell*, Ir. R. 2 C. L. 126); and see *Fitzgibbon v. Nagle*, 10 Ir. C. L. R. Ap. 35; *Smyth v. Scott*, 8 Ir. C. L. R. Ap. 35, where similar defences were set aside. On the other hand, a defence to an action of libel that the publication complained of is no libel, will not be set aside (*Nixon v. Harvey*, 8 Ir. C. L. R. 446). As to a defence of fair comment, see *Clinton v. Henderson*, 13 Ir. C. L. R. Ap. 43; *Travers v. Potts*, 15 Ir. C. L. R. Ap. 2; *Kane v. Mulvany*, Ir. R. 2 C. L. 402.

Defence of contributory negligence.

General issue.

A plaint so framed that it is uncertain whether the gist of the action be for a malicious prosecution or an arrest, will be set aside under this section (*Allen v. M'Coombe*, 8 Ir. Jur. N. S. 310; *Harrington v. Murphy*, 3 Ir. L. T. 407); and so also will a count in contract, which alleges as a breach that the defendant fraudulently omitted to deliver an account (*The Great Ship Co. v. Russell*, 3 F. & F. 94); and for other instances of pleadings which have been set aside on the grounds of uncertainty and ambiguity, see *Craig v. Beattie*, 1 Ir. L. T. 209; *Rutledge v. Blake*, *ib.* 349; *Stewart v. Robinson*, Ir. R. 3 C. L. 69; *Byers v. Beattie*, Ir. R. 1 C. L. 209; where a defence of *non damnificatus* was set aside.

Again, a pleading, which may not be open to objection on the grounds of being ambiguous, will be set aside, if wanting in due particularity and expli-

Where pleading

wanting in
particular-
ity.

citiness. The amount of particularity requisite in a pleading varies with the nature of each particular case. When a party states in his pleading a conclusion of law, he should set out in his pleading the facts on which the conclusion is rested; and if he does not, his pleading may be set aside—as, for instance, where a defendant pleaded that, “on the true construction of a certain deed, the plaintiff was bound to produce a debenture” (*Malone v. Harris*, 2 Ir. Jur. N. S. 324; *Pontet v. Magrath*, 6 Ir. Jur. O. S. 253). A defence to an action of trespass, alleging that the defendant had a right to enter to distrain, and that the entry was in virtue of such right, was set aside, as not showing the nature of the right. On the same principle, where a party complains of a violation of a duty, it is not sufficient to charge generally a violation of duty: the facts from which the duty flows must be averred (*Potts v. Plunkett*, 9 Ir. C. L. R. 290).

When the allegation in a pleading is not a conclusion of law, but one of fact, or of mixed law and fact, the pleading will be set aside, if the allegation is too general. Thus, where a defence to an action of trespass is founded on an easement claimed by the defendant, the defence should show the facts, &c., on which the easement claimed is founded (*Hall v. Burton*, 8 Ir. Jur. N. S. 391). So, also, a defence to an ejectment for non-payment of rent which alleged a discharge of the rent, was set aside, for not showing how (*Hughes v. Browne*, 13 Ir. C. L. R. Ap. 5). And where a defendant pleaded that he did the acts complained of as a Justice of the Peace, and with respect to matters within his jurisdiction, the defence was set aside upon similar grounds (*Donohoe v. Keogh*, 17 Ir. C. L. R. 39). On the same principle, when a defendant to an action for libel or slander wishes to plead a defence of justification or privilege, he should not plead such defence generally, but should state the particular facts on which he relies as constituting the justification, or conferring the privilege (*Janson v. Stuart*, 2 Sm. L. C. 5th ed. p. 55; *Praeger v. Shaw*, 4 Ir. C. L. R. 660). So, also, a defence to an action upon a bill of exchange, “that the plaintiff did not give the defendant any consideration for the indorsement to the plaintiff of the bill of exchange” was set aside as embarrassing (*Faris v. Ross*, 1 Ir. Jur. 109, 137). In such a case, the defence should show specifically how there was no consideration. A defence to an action upon a note that the plaintiff was not the lawful holder thereof, was ordered to be amended (*Barber v. Doyle*, 12 Ir. C. L. R. 342). A defence by a railway company, relying upon an inevitable accident, should state the facts constituting such inevitable accident (*Burns v. Cork and Bandon Railway Co.*, 13 Ir. C. L. R. 543). On the same principle, the names of persons referred to in a pleading must, in general, be given; and the omission to state them is a good ground for setting it aside (*Gibbons v. Cusack*, 14 Ir. C. L. R. 284; *Godfrey v. Cross*, 12 Ir. C. L. R. 333). In such a case, however, and more especially where the persons are referred to in the averment of special damage, the Court may refuse to set the writ aside, and order the party to furnish particulars of the names (*Smith v. Dublin and Drogheda Railway Co.*, 7 Ir. Jur. O. S. 395). As to the necessity of stating the names of persons in the allegation of special damage, see *Evans v. Harris*, 1 H. & N. 251; where it was held that in an action for slander of the plaintiff in his business of an inn-keeper, it is sufficient to allege and prove, as special damage, a general loss of custom, without stating the names of the customers who have ceased to frequent the inn.

Names of
persons.

Plea of fraud.

A defendant need not, in general, set forth in his defence the particular

facts of fraud relied on by him in a defence to that effect; but if necessary, he will be ordered to furnish particulars (*Reddick v. Cavanagh*, 3 Ir. C. L. R. 582; *McCreight v. Stevens*, 1 H. & C. 454); and see *Hooper v. Bristol Port Co.*, 35 L. J. C. P. 299. Neither is it necessary, in general, that he should set forth the grounds of belief or suspicion relied on by him in his defence (*Fox v. Broderick*, 8 Ir. Jur. N. S. 194; *Buckley v. Barry*, 1r. R. 2 C. L. 363, overruling *Hennessy v. Morgan*, 8 Ir. C. L. R. Ap. 69); and see *Callaghan v. Sullivan*, 1 Ir. L. T. 713. And where an action is brought by the assignee of a reversioner named in a lease, the plaintiff may aver generally that all the estate and interest of the reversioner has become vested in him; and a plaint containing such an averment will not be set aside for want of particularity (*Lindsay v. O'Neill*, 5 Ir. C. L. R. 461, per Monahan, C. J.; *Stapleton v. Bergin*, 4 Ir. C. L. R. 421).

Grounds of belief and suspicion.

Although a pleading may be perfectly unambiguous in its language, and free from any objection as wanting in particularity, there are several other defects in pleading, for which it may be set aside under the above section. Thus, a defence will be set aside if it be an answer to a part only of the cause of action, unless it be confined to the part to which it is an answer (*Garrett v. Waldron*, 9 Ir. C. L. R. Ap. 24; *Dunsandle v. Finney*, 10 Ir. C. L. R. 171; *Ammarman v. Robins*, 7 Ir. C. L. R. 415; *Lynch v. Irwin*, 8 Ir. Jur. N. S. 155); with which cases compare *Yorell v. Proby*, 1r. R. 2 C. L. 460. So, also, a plaint, defence, or other pleading will be set aside on the ground of duplicity. In *Redmond v. Clarke*, 1r. R. 4 C. L. 316, a plaint, which complained that the defendant negligently managed a vicious horse which he knew to be vicious, was set aside, as double; and in *Callaghan v. City of Dublin Steam Packet Co.*, 1 Ir. L. T. 247, a count in a plaint which relied on two different acts of negligence, was set aside on similar grounds; and see *Wyse v. Lewis*, 9 Ir. Jur. N. S. 84; *Whitty v. Jackson*, 3 Ir. L. T. 425. In the latter case, the action being brought under Lord Campbell's Act, a defence, traversing that the family of the deceased suffered any pecuniary loss by reason of his death, was set aside, as leaving it uncertain whether it traversed the loss only, or both the relationship and the loss.

Where defence an answer to part only.

Duplicity.

On the other hand, where to a count for goods, &c., supplied to A. B. at the defendant's request, a traverse was pleaded that "no goods were supplied to A. B. at the defendant's request" the defence was held not to be double (*Crassan v. Johnston*, 8 Ir. C. L. R. Ap. 46); and for a traverse to a count for interest, see *Kelly v. Duffy*, 7 Ir. C. L. R. 36. A traverse of an allegation contained in a previous pleading may, however, be double, though the traverse be in the words of the previous allegation. Thus, a defence to an action of libel that the defendant did not falsely or maliciously publish the words complained of, is double (*Powell v. Brien*, 6 Ir. Jur. O. S. 278); and where, to a count alleging that the defendant, maliciously and without reasonable or probable cause, assaulted the plaintiff, and caused him to be imprisoned, a defence alleging that the defendant did not maliciously, or without reasonable and probable cause, assault the plaintiff, or cause him to be imprisoned, was set aside by the Court of Exchequer as double (*Brennan v. Williams*, 9 Ir. C. L. R. Ap. 35, Pigot, C. B., *dissentiente*); and the decision was followed in *Smith v. Whelan*, 10 Ir. C. L. R. Ap. 17; with which compare *Darcey v. Cahill*, 6 Ir. C. L. R. 121. As to the form of the defence in such a case, see *Seymour v. Crooks*, 1 Ir. L. T. 192. And as to setting aside a plaint containing such an allegation, see *Harrington v. Murphy*, 3 Ir. L. T. 407; *Allen*

v. *M'Coombe*, 8 Ir. Jur. N. S. 310. On the same principle, a defence to an action of trover, that the defendant did not convert the goods of the plaintiff, will be set aside as double (*Findlater v. Duggan*, 3 Ir. Jur. N. S. 258; *Stevenson v. Lawler*, Ir. R. 2 C. L. 77). In *Winton v. Moore*, 8 Ir. C. L. R. 234, where the action was for wrongful dismissal, and the plaintiff charged that, by agreement between the plaintiff and the defendant, the plaintiff entered into the service of the defendant, a traverse in the terms of the allegation was held by the Court of Exchequer (Greene, B., *dissentiente*) not to be double, although it was objected that it put in issue both the agreement and the entry into the service. And see further, *infra*, as to traverses in the words of an allegation. A defence to an action of trespass, that the defendant did not commit the trespasses alleged, will be set aside (*Stevenson v. Lawler*, Ir. R. 2 C. L. 77). As to a defence alleging that the defendant "did not do the acts complained of, or any of them," see *Smith v. M'Cormack*, 1 Ir. L. T. 209. In several of the cases which have been just mentioned, the objection to the pleading was not so much that the pleading was double, as that it left uncertain whether the pleader intended to traverse one or more than one necessary allegation. Where a defence is double, the plaintiff cannot mark a judgment under the 45th General Order; his course is, to apply to the Court to set it aside (*Austin v. Twile*, 8 Ir. C. L. R. 30). As to setting aside a replication for duplicity, see *Germaine v. Athenæum Life Assurance Co.*, 5 Ir. C. L. R. 205.

Prolixity.

Pleadings may be set aside under the section for prolixity, as in (*Moynehan v. Barry*, 9 Ir. Jur. N. S. 176), where matter of evidence was stated by way of inducement. So also, where the plaint contained several counts which unnecessarily varied the cause of action, it was ordered to be amended (*Carson v. Lindsay*, Q. B. T. T. 1870); and as a general rule untraversable averments should not be introduced into plaints, or other pleadings (*Clinton v. Henderson*, 13 Ir. C. L. R., Ap. 43).

When one of the paragraphs of the defence is applicable to several counts in the plaint it should not be unnecessarily repeated, but pleaded distributively to the counts to which it is applicable (*Montgomery v. Middleton*, 7 Ir. Jur. N. S. 30).

A defence containing a short abstract of title, in an action for slander of title, will not be set aside as embarrassing (*Crean v. Gamble*, 7 Ir. Jur. N. S. 31).

Defences may also be set aside as frivolous or immaterial; and if the defendant in such cases has no defence upon the merits leave will be given to the plaintiff to mark judgment (*Loughran v. Hill*, 6 Ir. C. L. R. 385; *Bradbury v. Emans*, 5 M. & W. 595; *Knowles v. Burward*, 10 A. & E. 19; *Codd v. Smith*, 2 Ir. L. T. 211).

An embarrassing defence will be set aside on motion even though it would be held bad on demurrer (*Loughran v. Hill*, *ubi supra*; *Eirly v. Smith*, 7 Ir. C. L. R. 397).

Argumentativeness.

When a pleading is not open to objection upon any of the grounds just enumerated it will not be set aside merely on the ground of argumentativeness; and in point of fact where the plaint is framed upon a special contract, the terms of which are not fully set forth in the plaint, the more proper course for a defendant to adopt, who has a defence founded on the term not set forth, is not merely to traverse the making of the agreement relied upon, but, in addition, to plead a further defence, setting forth the additional terms by which the contract is qualified, and which the plaintiff has omitted to state, and then plead any matter by way of confession and avoidance, founded

on the terms so introduced which furnishes an answer to the action (*Kenyon v. Tayleur*, 8 Ir. C. L. R., Ap. 76). In that case, the action being for breach of a contract to deliver coals, the defendant pleaded a special defence, in which he set forth an additional term by which the contract was qualified, and which the plaintiff had omitted to state, and then averred that upon breach by the plaintiff of the contract so qualified he had, as he lawfully might, rescinded the contract, and the Court refused to set aside the defence as argumentative; and the same principle was adopted in *Hagboud v. Paul*, 8 Ir. C. L. R., Ap. 23; and *Denniston v. Digan*, 10 Ir. C. L. R., Ap. 7. In *Kingsley v. Hackett*, 8 Ir. Jur. N. S. 152, the Court of Exchequer expressed its dissent from the principle of *Kenyon v. Tayleur*, but considered itself bound by it as an authority. On the same principle as that adopted in *Kenyon v. Tayleur*, the Court will not set aside a pleading where it is open to the opposite party to demur or plead, and no embarrassment can arise in case he adopts either course (*Glynn v. Dillon*, 8 Ir. C. L. R., Ap. 71; *Fitzgerald v. Rowan*, 6 Ir. Jur. O. S. 281). A defendant, however, to an action for libel or slander who seeks to plead a plea of justification or of privilege, must justify or excuse the words mentioned in the summons and plaint, and must do so in the meaning put upon them by the *innuendo*, and a defence which justifies or excuses words different from them in the plaint, or which justifies or excuses them in a meaning different from that in the *innuendo*, will be bad upon demurrer (*Custis v. Sandford*, 4 Ir. C. L. R. 426; *Dunne v. O'Grady*, 5 Ir. C. L. R. 450). So also when a defendant sets forth in his defence a contract different from that relied upon in the plaint, and admits a breach of it, he cannot pay money into Court under the 75th section of the Act (*The Duke of Bedford v. Lord Oranmore*, 8 Ir. Jur. N. S. 151; *Byrne v. The Magnetic Telegraph Co.*, 4 Ir. C. L. R. 94). When a defendant traverses an allegation in the summons and plaint he should, as a general rule, traverse it in the manner in which it is alleged, and the defendant cannot object to a defence containing such a traverse, provided the allegation be not in its nature double, as to which see *supra*; or the traverse does not amount to the general issue, as to which see also *supra*. Thus in actions of ejectment for non-payment of rent, where the plaint is in the form contained in the schedule to the Act, a defence alleging that the defendant does not hold the lands as tenant to the plaintiff will not be set aside as embarrassing for not alleging that neither the defendant nor any other person holds the lands as tenant to the plaintiff (*Keene v. M'Blaine* 17 Ir. C. L. R. 654). The form of the defence in such an action has been discussed in several cases. See *Figgis v. Hickey*, 7 Ir. Jur. O. S. 160; *Murphy v. Carey*, 12 Ir. C. L. R., Ap. 9; *Dillon v. Mangan*, 1 Ir. Jur. N. S. 335; *Bell v. Beatty*, 6 Ir. C. L. R. 399; *Gore v. M'Cullagh*, 2 Ir. Jur. N. S. 493; *Dexter v. Lloyd*, 10 Ir. Jur. N. S. 116; *Elgee v. O'Hare*, 3 Ir. L. T. 468.

Traversing an allegation in the words in which it is alleged.

As instances of cases where defences have been set aside, on the grounds of not traversing an allegation in the words of the allegation, see *Byers v. Beattie*, Ir. R. 1 C. L. 209; *Lynaght v. Lee*, 8 Ir. Jur. N. S. 112; *Craig v. Faloon*, 4 Ir. Jur. N. S. 202; *Duffy v. Rooney*, 6 Ir. Jur. N. S. 20. In the latter case, an action having been brought against two joint makers of a promissory note, a defence by one of the defendants that "he" did not make the note was set aside. A traverse should not on the one hand be too narrow, nor on the other hand too large, as, for instance, by being taken in the conjunctive instead of the disjunctive, nor should it be taken on an im-

material point, or on a mere matter of law. Steph. Pl. 6th Ed. pp. 165, 205, 209. A defence, however, to an action of libel that the publication complained of is not a libel, is a good defence (*Nixon v. Harvey*, 3 Ir. C. L. R. 446; *Spong v. Fahy*, 5 Ir. C. L. R. 351; *O'Connor v. Fisher*, 4 Ir. C. L. R. 246); and in *Riordan v. Cork & Macroom Railway Co.*, 1 Ir. C. L. R. 88, a defence to an action for negligence traversing that the injury complained of was sustained by reason of the act of negligence complained of was held to be unobjectionable.

Where a frivolous objection is made.

If the objection to the plaint or other pleading be merely frivolous, the Court will refuse an application to set it aside, or it may give leave to amend without the payment of costs (*Cruise v. Connell*, 11 Ir. C. L. R. Ap. 21), in which case, a count upon a promissory note omitted to aver that the defendant did not pay the amount (*Bush v. Curran*, 9 Ir. C. L. R. Ap. 28), where in a plea of set-off the word "plaintiff" was inserted by mistake in place of the word "defendant."

Sham defence.

A sham defence, i. e. one false in point of fact, will not, as a general rule, be set aside on motion (*Marquis of Drogheda v. O'Hanlon*, 1 Ir. C. L. R. 319), where the cases are collected, although at one time the Court set aside defences upon that ground. Nor will a defence be set aside merely on the ground of its putting the opposite party to difficult, expensive, and needless proof (*Welland Railway Co. v. Blake*, 6 H. & N. 410). If, however, the defence be false upon the face of it, the plaintiff will be allowed to mark judgment (*Vere v. Carden*, 5 Bing. 413); and if the defence be manifestly frivolous, and bad in point of law, the Court will set it aside on motion, without putting the party to a demurrer (*Loughran v. Hill*, 6 Ir. C. L. R. 385; *Knowles v. Burward*, 10 A. & E. 19; *Codd v. Smith*, 2 Ir. L. T. 211). *Secus* where the defence is not clearly insufficient (*Archer v. McCalldin*, 6 Ir. Jur. N. S. 34).

Confessing part of cause of action.

Where a defendant confesses a part of the cause of action, and pleads to the rest, the defence will not be set aside on the grounds of the defendant not bringing the amount confessed into Court (*Tudor v. Furlong*, 1 Ir. C. L. R. 7; *Dougan v. Cowden*, 1 Ir. C. L. R. 202; *Hoare v. Stafford*, ib. 217; *Rutledge v. Davis*, ib. 339, overruling *Defries v. Stewart*, 11 Ir. C. L. R. Ap. 18). As to how such a defence should be framed, see *Dunsandle v. Finney*, 10 Ir. C. L. R. 171.

Defence pleaded against good faith.

A defence may be set aside if it be pleaded contrary to good faith (*Murphy v. Ryan*, 1 Ir. C. L. R. 602), in which case the defendant obtained an extension of the time to plead, and then pleaded *action pending*; or if pleaded contrary to agreement (*Rankin v. Hamilton*, 15 Q. B. 195; *Cusack v. Cusack*, 1 Ir. Jur. N. S. 49).

When application to be made.

It would follow from the decision in *O'Brien v. Taylor*, 2 Ir. Jur. N. S. 53, that an application to set aside a summons and plaint as embarrassing should not be made until the writ is filed, but it is doubtful whether the rule there adopted is correct. See *Doran v. Chancellor*, 1 Ir. R. 2 C. L. 127; per O'Brien, J. The notice of motion should state the particular objections on which the party intends to rely (*Martin v. Lane*, 10 Ir. C. L. R. Ap. 3; *Farrell v. Glass*, 6 Ir. Jur. N. S. 136). It should ask for the costs of the motion, but the Court may, even when they are not demanded by the notice, award them in a fit case (*Farrar v. Morris*, 7 Ir. C. L. R. 14). If the party applying fails in part and succeeds in part, or succeeds upon grounds different from those specified in the notice, no costs will be given, or they will be made costs in the cause (*Jones v. McGovern*, 1 Ir. C. L. 100, 104;

What notice of motion should state.

Costs.

Lysaght v. Lee, 8 Ir. Jur. N. S. 112). And it will be a good ground for refusing the party his costs, if the embarrassment complained of arises from a defect in his own previous pleading (*Blake v. Sheridan*, Ir. R. 3 C. L. 583).

When a defence is set aside as embarrassing, and there is no other defence upon the record, the Court will allow judgment to be marked if the defendant has no defence upon the merits (*Smith v. Grant*, 3 Ir. C. L. R. 585; *Flood v. Hennigan*, 1 Ir. Jur. N. S. 189). And the Court may, if necessary, require an affidavit of merits (*Bishop v. Wigram*, 7 Ir. Jur. O. S. 22). On the other hand, if the defendant has a defence upon the merits, leave will be given to amend. And where a summons and plaint was embarrassing, the Court, in order to prevent the operation of the Statute of Limitations, set aside the plaint only, and allowed the writ to stand as a summons (*Lalor v. Bland*, 8 Ir. C. L. R. 115).

Giving leave to amend.

An application to set aside a pleading as embarrassing will not, as a general rule, be refused, on the ground of not being made within a reasonable time, the 179th G. O. not applying to such a case (*Welsh v. Hull*, 9 M. & W. 14; *Bishop v. Wigram*, 7 Ir. Jur. O. S. 22).

Within what time application to be made.

With respect to the joinder of parties to actions (x).

Joinder of Parties.

Nonjoinder or misjoinder of parties.

84. No plea in abatement for the nonjoinder of any person as a party, plaintiff or defendant, shall be filed without the leave of the Court (y), but such defect, or the misjoinder (z) or misnomer (a) of any party may be pointed out by either party by notice before the trial, and such notice may be followed by a summary application to the Court or a judge in respect thereof; upon which application the said Court or a judge may make such order therein, and touching the costs thereof, as shall seem to be just (b).

(x) Under the old law objections arising from the nonjoinder and misjoinder of parties to actions were of frequent occurrence, and gave rise to considerable embarrassment, and it was, therefore, considered desirable, when the present Act was passed, to give the Courts of Law power to remedy the inconvenience arising from such objections, in the manner provided by the above and the following sections. Notwithstanding, however, the changes which have been thus introduced, it is still necessary to bear in mind that the state of the law was previous to the changes in question, inasmuch as subject to the provisions of the present Act it has remained unaltered.

Nonjoinder and misjoinder.

Under the old law, when a misjoinder or nonjoinder of parties, plaintiffs, or defendants, in an action occurred, there were three ways in which the defect might have been taken advantage of. In the first place, if the misjoinder or nonjoinder appeared upon the face of the record, and was of a fatal character, the defendant might have demurred, or moved in arrest of judgment, or brought error; in the next place when the defect did not appear upon the record, the defendant might have taken advantage of it in certain cases which will presently be mentioned, as a variance upon the trial; and thirdly, in certain other cases the defendant if he wished to take advantage of the defect was

Effects of misjoinder and nonjoinder.

When cause for demurrer.

obliged to plead in abatement, and could not rely upon the defect as a variance at the trial,

When cause
of a variance.

The cases in which a misjoinder or nonjoinder was the occasion of a fatal variance previous to the Act were these. In all actions of contract a misjoinder of plaintiffs or defendants (Bul. & Lea. Pr. Pl. 2nd. ed. p. 404), or a nonjoinder of plaintiffs (1 Wms. Saund. 291 *k*.) was fatal. Where indeed the action was brought by executors, the nonjoinder of one of the executors as a plaintiff could only be taken advantage of by a plea in abatement (1 Wms. Saund. 291 *l*.), and the coverture of a plaintiff could also be taken advantage of only in a similar manner. In actions of tort, a misjoinder of plaintiffs was fatal (2 Wms. Saund. 116 *b. n. (b)*).

When to be
pleaded in
abatement.

On the other hand, the cases where the defendant should have pleaded in abatement, for the purpose of taking advantage of the defect, were these—In actions of contract, if the plaintiff omitted to join a necessary party as defendant, the defendant should have pleaded in abatement, and if he did not he could not take advantage of the nonjoinder at the trial as a variance (*Rice v. Shute*, 1 Sm. L. C. 6th ed. p. 511). Nor could the defect be taken advantage of by demurrer, though it appeared upon the record (2 Wms. Saund. 210 *e*, note (*s*)). In an action against the assignees of a lessee upon a covenant in the lease, the nonjoinder of a defendant can only be taken advantage of by a plea in abatement, although the plaintiff avers that all the estate and interest of the original lessee has become vested in the defendants (*Grattan v. Wall*, 1r. R. 2 C. L. 484; *Shee v. Gray*, 15 Ir. C. L. R. 296). Where, however, an action was brought against a husband only, for a debt contracted by the wife *dum sola*, the defendant may take advantage of the defect by a plea in bar traversing the contract (*Garrard v. Giubelei*, 11 C. B. N. S. 616; 13 C. B. N. S. 822). If, however, the marriage has taken place subsequent to the 9th August, 1870, the action must now be brought against the wife alone, without joining the husband (33 & 34 Vict. c. 93, s. 12). Again, as pointed out above, the nonjoinder of an executor as plaintiff, or the coverture of the plaintiff or defendant in an action of contract, could only be taken advantage of by a plea in abatement. In actions of tort, where there was a nonjoinder of plaintiffs, the defendant, even in cases where the nonjoinder appeared upon the record, should plead the nonjoinder in abatement, but if he did not, he would at the trial be only liable for such portion of the damages as was incurred by the plaintiff alone (*Addison v. Overend*, 6 T. R. 766; *Bloxam v. Hubbard*, 5 East, 407). The nonjoinder of a defendant in an action of tort was no ground of objection, each tortfeasor being separately liable for the whole wrong done (*Mitchell v. Turnbull*, 5 East, 649); and a misjoinder of defendants in such an action would only entitle the defendant wrongly joined to a verdict in his favour, without affecting the verdict against the others (*Govett v. Radnidge*, 3 East, 62). Where indeed one tenant in common of land is sued in tort for anything respecting the land, he may, it appears, plead in abatement the nonjoinder of a co-tenant in common (1 Wms. Saund. 291 *g*).

Present law
upon the sub-
ject.

Such being the law formerly prevailing, the manner in which the inconveniences attending it have been remedied has been by giving to the Court and to the Judge at the trial a large power of amendment, and by preventing the filing of a plea in abatement, except by the leave of the Court, and subject to the restrictions provided by the 88th section. Subject, however, to these alterations, the law has remained unchanged, and if therefore a misjoinder or nonjoinder appears upon the record, such defect will, in all

cases where it would formerly have been demurrable, be yet a good ground for demurrer (*Bellingham v. Clark*, 1 B. & S. 332; *Cahill v. M'Dowall*, 13 Ir. C. L. R. 481). So also, if an amendment be not made pursuant to the provisions of the Act, the nonjoinder or misjoinder will be the occasion of a fatal variance at the trial.

The sections of the Act which deal with pleas in abatement, and with objections arising from the nonjoinder of a party as a defendant are the 84th, 88th, 89th & 90th. Section 85 gives the Court or a Judge power to amend before trial, in cases where there has been a misjoinder or nonjoinder of plaintiffs. Section 86 gives power to amend in the like cases at the trial. Section 87 enables a plaintiff to amend in the manner therein provided, where there has been an omission to join a proper party as a plaintiff, and the defect has been pointed out by the defendant; and Section 91 gives the Court or a Judge power to amend before or at the trial a misjoinder of defendants in an action of contract. The nonjoinder of a defendant cannot, however be amended at the trial (*Garrard v. Giubelei*, 11 C. B. N. S. 616; 13 C. B. N. S. 832); see, however, *Podmore v. Schmidt*, 17 C. B. N. S. 725.

It is a matter of some doubt whether the present sections of the act apply to actions of ejectment. If, however, they do not, the Court has power to amend under section 231, *post* (*Blake v. Done*, 7 H. & N. 465). In ordinary cases, the power of the Court to amend a misjoinder or nonjoinder is not derived under the 231st section, but wholly under the present ones (*Wickens v. Steel*, 2 C. B. N. S. 488; *Robson v. Doyle*, 3 E. & B. 396); and accordingly the misjoinder or nonjoinder is not such a defect or error as can be amended after the trial by the Court in banco, under the 231st section. The Court may, however, it would appear, amend the proceedings after the trial by striking out the name of a party wrongly joined, or inserting one who should have been joined, and *direct a new trial* at the same time (*Crawford v. Cocks*, 6 Ex. 287).

(y) The cases in which a plea in abatement for nonjoinder might have been pleaded have been just mentioned. Such a plea cannot now be pleaded without the leave of the Court, except, perhaps, a plea of the coverture of the defendant (*Jones v. Smyth*, 3 M. & W. 526).

Where the defendant intends to apply for leave to plead in abatement, he should before applying to the Court point out the defect by notice to the opposite party. A neglect to do so may have the effect of subjecting him to the costs of the motion. The plaintiff, on the other hand, when served with such a notice, may amend the plaint by adding the name of the persons or person named in the notice by entering a side-bar order, pursuant to sects. 87 & 89, *post*, and where the objection is well founded he should adopt this course. Where the objection relied on in the notice is the nonjoinder of a defendant in an action of contract, it may be prudent, even in cases where the objection is not well founded, to enter the order pursuant to sect. 89, as in case it turns out at the trial that the objection is not well founded, the plaintiff will under sect. 90 be entitled to judgment for the amount of his demand against the defendants really liable, and will also be entitled to recover all costs incurred by reason of joining the parties named. As to the requirements of a plea in abatement for nonjoinder, see sect. 88, *post*, notes (f) (g).

(z) In cases of misjoinder where the defect is a fatal one, the defendant is not bound to point it out by notice, but may either demur or take advan-

tage of the defect at the trial (*Bellingham v. Clarke*, 1 B. & S. 332; *Cahill v. M'Dowall*, 13 Ir. C. L. R. 481).

Misnomer.

(a) As to the effect of a misnomer in general, see ante, p. 7, note (i). And as to the distinction between a misnomer and a misjoinder, see *Glenison v. Bellew*, 7 Ir. C. L. R. 215; *Garrard v. Giubelei*, 11 C. B. N. S. 616, 624; *Podmore v. Schmidt*, 17 C. B. N. S. 725.

(b) The Court will not under this section make an order compelling a plaintiff to add a person named by the defendant as a co-defendant, but if he refuses to add the person so named, leave will be given to the defendant to plead in abatement (*Donegan v. Lyons*, Ir. R. 1 C. L. 323).

Amendment before trial of nonjoinder or misjoinder of plaintiff.
15 & 16 Vict.
c. 76, s. 34.

85. It shall be lawful for the Court or a Judge, at any time before the trial, to order that any person or persons not joined as plaintiff or plaintiffs in the action shall be so joined, or that any person originally joined as plaintiff shall be struck out of the pleadings in the action, if it shall appear to such Court or Judge that injustice will not be done by such amendment, and that the person to be added consents, either in person or by writing under his or her hand, to be so joined, or that the person to be struck out was originally introduced without his or her consent, or that he or she consents in the manner aforesaid to be so struck out; and such amendment shall be made upon such terms as to the amendment of the pleadings, postponement of the trial, and otherwise, as to the Court or Judge shall seem proper; and when any such amendment shall have been thereby made, the liability of any person who shall have been made co-plaintiff shall, subject to any order to the contrary, be the same as if such person had been originally joined in such action (c).

(c) This section provides for an amendment before trial of a nonjoinder or misjoinder of plaintiffs. As to the consequences of such misjoinder or nonjoinder in case no amendment is made, see note (x), *supra*.

The Court will not under this section, or the 231st section, *post*, allow an amendment to be made, in case an action is commenced in the name of a dead man, by substituting his representatives as plaintiffs (*Clay v. Oxford*, L. R. 2 Ex. 54). As to striking out a sole plaintiff and substituting another, see *La Banca Nazionale v. Hamburger*, 2 H. & C. 330; *Coombs v. Bristol and Exeter Railway Company*, 1 F. & F. 206; *Podmore v. Schmidt*, 17 C. B. N. S. 725.

Terms of amendment.

An amendment is generally allowed upon the terms of payment of the costs of the application and of the costs occasioned by amendment. The time within which the defendant is to plead to the plaint, as amended, is generally fixed by the order giving leave to amend. If it is not fixed, the time is provided for by sect. 44, *ante*, which see. As to the subject of amendment in general, see *post*, sect. 231.

Where it is not possible for the plaintiff to obtain the consent in the manner above provided of the persons whom it is proposed to join or strike

out as plaintiffs, the Court may possibly in certain cases, as where the Statute of Limitations would be a bar to a fresh action, allow an amendment to be made independently of this section : see 2 Ch. Pr. 12th ed. p. 1563.

86. In case it shall appear at the trial of any action that there has been a misjoinder of plaintiffs, or that some person or persons not joined as plaintiff or plaintiffs ought to have been so joined, and the defendant shall not at or before the time of pleading have given notice in writing that he objects to such misjoinder or nonjoinder, specifying therein the name or names of such person or persons, such misjoinder or nonjoinder may be amended by the Court or the Judge or presiding officer at the trial, by an order endorsed on the abstract of nisi prius or writ of inquiry, signed by any member of the Court, or by the said Judge or officer, if it shall appear to such Court, Judge, or officer that such misjoinder or nonjoinder was not for the purpose of obtaining an undue advantage, and that injustice will not be done by such amendment, and that the person or persons to be added consent, either in person or by writing under his, her, or their hand or hands, to be so joined, or that the person or persons to be struck out were originally introduced without his, her, or their consent, or that such person or persons consent in manner aforesaid to be so struck out in the manner aforesaid; and such amendment shall be made upon such terms as the Court, Judge, or officer shall think proper; and when any such amendment shall be made the liability of any person or persons who shall be added as a co-plaintiff or co-plaintiffs shall, subject to any order to the contrary, be the same as if such person or persons had been originally joined in such action (*d*).

Amendment
at trial.
15 & 16 Vict.
c. 76, s. 35.

(*d*) Under this section the misjoinder or nonjoinder of a plaintiff or defendant may be amended at the trial in the manner pointed out. There appears to be some doubt whether the discretion of a Judge at Nisi Prius in allowing or refusing an amendment of this description can be reviewed by the Court (*Tennyson v. O'Brien*, 5 E. & B. 497). In *Holden v. Ballantyne*, 29 L. J. Q. B. 148, 149, it was laid down, that if the Judge allows an amendment, the Court by virtue of the power which is inherent in it over its own proceedings will review his decision; but if he refuses to make the amendment, the Court cannot interfere. In that case the Judge at the trial had refused to amend a misjoinder of defendants, and the Court refused to rescind his decision. On the other hand, in cases where the power of amendment is derived under the 231st section, it has been frequently held that, although the Court will be slow to interfere with the Judge's discretion, it yet has power to do so when any real injury has been done by either his refusal to allow an amendment or his granting leave for

Appeal from
Judge's de-
cision.

that purpose in cases where leave should not have been given (*Brennan v. Howard*, 1 H. & N. 138; *Davis v. Reeves*, 5 Ir. C. L. R. 533, 535). And in such cases where the Judge refuses to amend, there is nothing to preclude the party aggrieved from making a substantive application to the Court for leave to amend (*Wilkin v. Reed*, 15 C. B. 192, 200). It may, however, be doubted whether the Court possesses the power to amend in this manner a misjoinder or nonjoinder of parties (*Robson v. Doyle*, 3 E. & B., 396). In *Crawford v. Cocks*, 6 Ex. 287, the Court under the circumstances of the case allowed the plaintiff, who had been nonsuited, to amend by striking out the names of two of the defendants, and directed a new trial.

Terms of amendment.

The terms on which the amendment will be allowed are in the discretion of the Judge at the trial, and his decision upon the point will not in general be reviewed by the Court (*Tomlinson v. Ballard*, 4 Q. B. 642). The amendment ought to be made, so that no additional expense be thrown on the defendant; and if the defendant pays at once the sum claimed under the amended summons or plaint, and it appears that he never contested the plaintiff's right thereto, he will be entitled to his costs from the time he might have paid money into Court; *secus* if he defends the action (*Smith v. Brandram*, 2 M. & G. 250).

When amendment is to be made.

When an application is made at the trial to amend a misjoinder or nonjoinder of plaintiffs, the power of the Judge is derived under this section, and not under section 231, *post*. The application should therefore be made and disposed of at the trial, i. e. before verdict, and not afterwards (*Robson v. Doyle*, 3 E. & B. 396; *Holden v. Ballantyne*, 29 L. J. Q. B. 148; *Wickens Steele*, 2 C. B. N. S. 488).

As to what amendment will be allowed see *supra*, note (c).

Upon notice of nonjoinder of plaintiffs, proceedings may be amended. 15 & 16 Vict. c. 76, s 36.

87. In case such notice be given by the defendant of the nonjoinder of a person as co-plaintiff, the plaintiff shall be at liberty to enter a side-bar order, to amend the summons and plaint, and other proceedings, by adding the name or names of the person or persons named in such notice, and to proceed in the action, on payment of the costs of and occasioned by such amendment only; and in such case the defendant shall be at liberty to plead *de novo* when he has pleaded already, and shall have four days from the service of the notice of such amendment for the purpose of pleading as aforesaid (e).

How amendment made.

(e) When an amendment is made under this section, the plaintiff must file a consent in writing of the party or parties whose name or names is, or are to be, added, together with an affidavit of the handwriting, and give notice thereof to the defendant, unless the filing of such consent be dispensed with by order of the Court or a Judge; 41st G. O. 1854.

The payment of the costs of, and occasioned by, the amendment being made a condition precedent to the amendment, the plaintiff should have the defendant's costs taxed, and pay or tender them to the defendant, otherwise his proceeding in the action would be irregular (*Levy v. Drew*, 5 D. & L. 307).

88. Upon any objection for nonjoinder of a defendant being taken by plea of abatement (*f*), or by motion to the Court in consequence of such nonjoinder, it shall be competent to the plaintiff to show that such person so omitted is not a necessary party, or is not resident within the jurisdiction of the Court (*g*), or has been discharged by bankruptcy or insolvency, or that the Statute of Limitations would be a bar to any action against him.

Proceedings when non-joinder of defendant objected to. 3 & 4 Vict. c. 105, s. 37. 3 & 4 Wm. 4, c. 42, ss. 8, 9.

(*f*) A plea in abatement for nonjoinder of a party cannot be filed without the leave of the Court, section 84, *ante*. The plea in such a case, if leave to plead it be given, should mention the names of all the persons who have not been joined, so that the plaintiff may have a better writ. And if, therefore, upon an issue taken upon a plea in abatement it appears that others besides those named in the plea were also co-contractors the plaintiff is entitled to a verdict (*Crellin v. Calvert*, 14 M. & W. 11). It should also aver that they are still living. By the provisions of the above section, moreover, the plea cannot be successfully pleaded if the person so omitted is not resident within the jurisdiction, or has been discharged by bankruptcy or insolvency, or if the statute of limitations would be a bar to an action against him; and where there are several joint contractors it will be a good answer to the plea to show that one of the joint contractors is resident out of the jurisdiction (*Joll v. Cheson*, 4 C. B. 249). Under 3 & 4 Vict. c. 105, s. 37, the affidavit verifying the plea should have stated the residence of the party omitted. The section in question has, however, been repealed by the present Act.

What plea in abatement should state.

By 11 G. 4. & 1 W. 4, c. 68, s. 5, in an action against a coach proprietor or common carrier for loss or injury to any parcel, package, or person, no plea in abatement can be filed for the nonjoinder of a co-proprietor.

A plea in abatement for nonjoinder must be verified by affidavit pursuant to 6 Anne, c. 10, s. 11 *Ir.*; and by the 44th G. O. 1854, the affidavit must be annexed to the pleading and entitled in the cause. The whole matter of the plea must be verified by the affidavit (*Odell v. Raymond*, 2 Fox & Sm. 214) and in case the plea is not verified in the proper manner the plaintiff may apply to the Court for leave to mark judgment (*Coleman v. Grady*, Smythe, 155).

Must be verified.

A plea in abatement of the coverture of the defendant is not, it would appear, a plea in abatement for nonjoinder within the meaning of the above section (*Jones v. Smith*, 3 M. & W. 526). It may, therefore, be pleaded without leave, but it must be verified pursuant to the 6th Anne, c. 10, s. 11, *Ir.* Such a plea must, moreover, be pleaded by a married woman in person, as she cannot appoint an attorney (*Bergin v. Burke*, 4 *Ir. C. L. R.* 90).

Plea of coverture.

If the defendant applies for leave to plead a plea in abatement of the nonjoinder of a party as a defendant, it will in general be prudent for the plaintiff to amend pursuant to the next section, see note (*y*), p. 89, *supra*, and it will be also observed that if the plaintiff takes issue upon such a plea, and the plea is proved, there can be no amendment at the trial, inasmuch as there is no provision in the Act authorising an amendment of a nonjoinder of defendant's at the trial (*Garrard v. Giubelei*, 11 C. B., N. S. 616; 13 C. B., N. S. 832).

What is a residence.

(g) If the party omitted be within the jurisdiction, merely for a temporary purpose, and is not actually *residing* in it, the nonjoinder cannot be pleaded in abatement; and, on the other hand, the nonjoinder may be pleaded if the party be absent abroad for a merely temporary purpose. The word residence is to be understood as meaning the domicile or home of the party (*Lambe v. Smythe*, 15 M. & W. 433).

Upon notice of nonjoinder of defendants proceedings may be amended.
15 & 16 Vict.
c. 76, s. 38.

89. In any action on contract where the nonjoinder of any person or persons as a co-defendant or co-defendants has been objected to by notice or plea of abatement, the plaintiff shall be at liberty to enter a side-bar order to amend the writ of summons and plaint by adding the name or names of the person or persons named in such notice as joint contractors (h), and to serve the amended writ upon the person or persons so named in such notice (i), and to proceed against the original defendant or defendants, and the person or persons so named in such notice, provided that the date of such amendment shall, as between the person or persons so named in such notice and the plaintiff, be considered for all purposes as the commencement of the action (j).

(h) The plaintiff need not adopt this course unless he wishes to do so; if, however, he does not, leave will be given to the defendant to plead in abatement (*Donegan v. Lyons*, Ir. R. 1 C. L. 323).

How amendment to be made.

(i) If the writ has been filed before amendment, it cannot be taken off the file for the purpose of serving the defendants added by amendment, and the side-bar order giving leave to amend should provide that service of an attested copy of the writ as amended upon the parties named should be deemed good service (*Conolly v. Evans*, 7 Ir. Jur. O. S. 182).

Position of the defendant added pursuant to notice.

(j) When the summons and plaint is amended under this section by adding a new defendant, the defendant so named may stay proceedings against himself by payment of the debt and costs within six days of the service upon him, pursuant to the 7 G. O. 1854 (*Meusom v. Mountcastle*, 1 F. & F. 721); and it would appear that the payment will operate to stay all proceedings in the action.

Subsequent proceedings against the persons named in a notice for nonjoinder of defendant.
15 & 16 Vict.
c. 76, s. 39.

90. In all cases after such notice of objection or plea in abatement in respect of the nonjoinder of a party as defendant, and amendment in pursuance thereof, if it shall appear upon the trial of the action that the person or persons so named in such notice was or were jointly liable with the original defendant or defendants, the original defendant or defendants shall be entitled, as against the plaintiff, to the costs of such notice and amendment; but if at such trial it shall appear that the original defendant or any of the original defendants is or are liable, but that one or more of the persons named in such notice is or are not liable as a contracting

party or parties, the plaintiff shall nevertheless be entitled to judgment against the other defendant or defendants who shall appear to be liable, and every defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same, together with the costs of the notice and amendment, as costs in the cause against the original defendant or defendants who shall have so objected to the nonjoinder of such person : provided always, that any such defendant who shall have so objected shall be at liberty on the trial to adduce evidence of the liability of the defendants named by him in such notice (k).

(k) See as to the construction of this section, *Cazneau v. Morrice and others*, 25 L. J. Q. B. 126. In that case the plaintiff added two new defendants after a plea in abatement had been pleaded. The original defendant thereupon paid a sum of money into Court in full of the plaintiff's demand, and the new defendants pleaded never indebted. The jury found that the sum paid in was sufficient, and that the new defendants were jointly liable with the original defendant, and it was held that the original defendant was entitled to the costs of the plea in abatement and of the amendment, and also to the general costs of the cause and of the trial ; and further, that the plaintiff was not entitled to any costs as against the new defendants.

How costs to be borne.

91. It shall be lawful for the Court or a Judge in the case of the joinder of too many defendants in any action on contract (l), at any time before the trial, to order that the name or names of one or more of such defendants be struck out, if it shall appear to such Court or Judge that injustice will not be done by such amendment ; and the amendment shall be made upon such terms as the Court or Judge by whom such amendment is made shall think proper (m) ; and in case it shall appear at the trial of any action on contract that there has been a misjoinder of defendants, such misjoinder may be amended, as a variance, at the trial, in like manner as the misjoinder of plaintiffs has been herein-before authorized to be amended, and upon such terms as the Court, or Judge or other presiding officer, by whom such amendment is made, shall think proper (n).

Misjoinder of defendants may be amended before or at the trial. 15 & 16 Vict. c. 76, s. 37.

(l) Under this section the misjoinder of defendants in an action of contract may be amended. No provision is made for a misjoinder of defendants in an action of tort, inasmuch as such a misjoinder was not fatal previous to the passing of the Act. In such cases it is open to the plaintiff to enter a *nolle prosequi* as to a defendant wrongly joined at any time before the trial, and if a misjoinder of defendants in an action of tort appears at the trial the only result would be that the party wrongly joined would be entitled to a verdict, while the plaintiff, on the other hand, would be entitled to a verdict

Misjoinder of defendants in an action of tort.

against the other defendants. In *Thompson v. Kelly*, 12 Ir. C. L. R. Ap. 50, where the action was brought for trespass against several defendants, one of whom had not been served, the plaintiff was allowed to amend his summons and plaint by striking out the name of the defendant, on whom the writ had not been served.

Amending
nonjoinder
of defend-
ant.

There is no provision in the statute as to amending a nonjoinder of a defendant at the trial, and such a defect cannot be amended (*Garrard v. Giubelei*, 11 C. B. N. S. 616; 13 C. B. N. S. 832). In one case, however, where the person served and sued was so served and sued through mistake for another, the Judge at the trial allowed a verdict to be entered up against the person intended to be sued, on the ground, apparently, that the mistake only amounted to a misnomer (*Podmore v. Schmidt*, 17 C. B. N. S. 725).

Striking out
the name of
a defendant.

(m) When a defendant in an action of contract is struck out at the instance of the plaintiff, the other defendant will in general be allowed to plead in abatement, if so advised (*Cowburn v. Wearing* 9 Ex. 207). As to the costs of the several parties, in case a defendant is struck out, see *Jackson v. Nunn*, 4 Q. B. 209; and see further as to the terms, &c., of amendment, *supra*, notes (c) and (d).

When al-
lowed.

(n) Under this part of the section the Judge at the trial has power to strike out the name of a defendant in an action of contract who has been improperly joined. The power so conferred has been exercised in a case where one of seven co-defendants had suffered judgment by default, and the application was to strike out the names of two of those who had appeared (*Johnson v. Goslett*, 18 C. B. 728); and conversely the name of a defendant who has already suffered judgment by default, has been struck out (*Greaves v. Humphreys*, 4 E. & B. 851); and see further as to striking out a defendant wrongly joined, *Cooper v. Sanders*, 1 F. & F. 13; *Mulford v. Griffin*, *ib.* 145; *Robinson v. Rudkins*, 26 L. J. Ex. 56. Where, however, a defendant has been joined, not by mistake, but intentionally, and with the deliberate purpose of trying to fix him with liability, it has been held that the section does not apply (*Wickens v. Steel*, 2 C. B. N. S. 488; *Holden v. Ballantyne*, 29 L. J. Q. B. 148). The application for leave to amend must be made at the trial. It may be made after the plaintiff's case has closed (*Salter v. Burnaby*, 1 F. & F. 138), but it cannot be made after the jury have decided the question of liability by their verdict (*Robson v. Doyle*, 3 E. & B. 396; *Wickens v. Steel*, *ubi supra*). When, however, the Statute of Limitations would have been an answer to a fresh action, the Court, under the circumstances, allowed an amendment to be made after the trial and directed a new trial (*Crawford v. Cocks*, 6 Ex. 287).

When appli-
cation to be
made.

As to the power of the Court to review the decision of the Judge at the trial, in giving or refusing leave to amend, and as to other matters connected with amendments made at the trial, see *ante*, sect. 86, note (d).

Costs.

As to the costs of a defendant struck out at the trial, see *Redway v. Webber*, 13 C. B. N. S. 254.

Special cases

Questions of
law raised
by consent
without
pleading, 15
& 16 Vict.
c. 76, s. 46.

And for the determination of questions raised by consent without pleading, be it enacted as follows :

92. The parties may, after writ issued, and at any stage of the proceedings before judgment, by consent and order of a Judge, state any question or questions of law in a special case for the opinion of the Court, without any further pleading (o).

(o) Under this and the following sections, parties who are interested in the determination of a question of law affecting their rights, may obtain the decision of the Court without being obliged to raise the question upon the record, or at the trial in the usual manner. Previous to the act, if the parties to an action were able to agree upon a statement of fact, they might, pursuant to 3 & 4 Vict. c. 105; s. 50 (repealed by the present act), draw up such statement *after issue joined* in the form of a special case for the judgment of the Court without proceeding to trial. The above enactment is an improvement on this, for the parties may now have a special case stated without any pleading, further than the summons and plaint.

Stating a question of law.

There is no provision contained in the present Act, by which parties may proceed to the trial of a question of fact, affecting their rights without formal pleadings, although the English Common Law Procedure Act, 15 & 16 Vict. c. 76, ss. 42-45, contains such a provision. However, under the 8th & 9th Vict. c. 109, s. 19 (*post*, in the Appendix), whenever a Court of Law may desire to have any question of fact decided by a jury, it may direct an issue; and see *Goodfellow v. Hunter*, 9 Ir. Jur. N. S. 48. By section 4 of the C. L. P. A. 1856, moreover, the parties to any cause may by consent leave to the decision of the Court any issue of fact. And see further the Interpleader Act, 9 & 10 Vict. c. 64, *post*, in the Appendix.

Question of fact.

In order that the parties to an action may be able to avail themselves of the benefits of the provisions of the present Act, the question at issue between them must be one of law, and if matters of fact are in issue between them, or the question of law to be decided involves the determination of an issue of fact, the Court will leave the parties to go to a jury (*Aldridge v. Great Western Railway Co.*, 3 M. & G. 515; *Price v. Quarrell*, 12 A. & E. 784, 788). In the former of those cases the action was brought against a company for the negligent management of a steam-engine, and the Court, under the circumstances, considered that the facts stated were not sufficient to enable them either to infer negligence on the part of the defendants, or to acquit them thereof, and the special case was therefore withdrawn. The Court may, however, draw inferences of fact, where a power to do so is given by the parties and accepted by the Court (*Doe v. Crisp*, 8 A. & E. 779). Such a power will not, however, be accepted by the Court where there is conflicting testimony (*Brockbank v. Anderson*, 7 M. & G. 295, 313; *Whitmore v. Claridge*, 8 Jur. N. S. 1059). Neither will the Court allow a special case to be stated for the purpose of determining a mere speculative question, or if there be reason to believe that the action is not *bona fide* brought for the purpose of determining a matter in actual present controversy between the parties (*Kelly v. Molony*, 4 Ir. C. L. R. 413; *Anon.* 4 Ir. C. L. R. 210 n.), and therefore if the action be a mere friendly suit, for the purpose of obtaining the opinion of the Court upon the true construction of a will and allaying doubts, the Court will decline to give any opinion (*Doe v. Duntze*, 6 C. B. 100).

Interpleader.

When special cases may be stated. Where a question of fact is involved.

Where matter is not in actual controversy.

The parties to a special case cannot by agreement evade the provision of the Stamp Acts, and if, therefore, it is provided by the special case that an unstamped instrument shall form part of the case, the Court will order the special case to be struck out (*Nixon v. Albion Marine Insurance Co.*, L. R. 2 Ex. 338).

Where parties are desirous of stating a case for the opinion of the Court, it is advisable in the first instance to agree upon the form of it, and as to the money to be paid upon the decision of it. An arrangement should also be

How special case is to be stated.

come to as to whether error may or not be brought, and as to the costs of the proceedings, see next section. When these matters have been arranged a writ should be issued and a consent prepared and signed by the counsel on both sides, upon which, the Judge before whom the motion is moved will make an order, giving the parties leave to state the special case, provided the question at issue is a proper one to be decided in that manner. As to the form of a special case, see *Greville v. Gunn*, 4 Ir. C. L. R. 201, where the special case as stated is set forth. It should be signed by counsel (*Branchardière v. Elvery*, 18 L. J. Ex. 381). When the order has been made, the party having the carriage of it should, pursuant to the 158th G. O. 1854, proceed to make up books for the Judges, and set down the case for argument, in the same manner as directed by the 50th G. O. with reference to demurrers. When the case comes on to be argued, the argument must be opened on both sides by junior counsel (*Ellis v. O'Neill*, 4 Ir. C. L. R. 467), and if the special case contains several questions, the Court will deliver a separate judgment on each question, as a general judgment would be insufficient (*M'Dowell v. Keating*, 3 Ir. Jur. N. S. 20).

Judgment
on a special
case.

Costs.

As to the costs of a special case, in case no agreement has been come to in reference to them, see sect. 95, *post*.

Amending a
special case.

As a general rule, when a special case has been stated under this section, the Court will not at the instance of one of the parties order it to be amended, unless the point as to which the amendment is sought has been omitted by error or through fraud (*Mersey Docks v. Jones*, 29 L. J. C. P. 239; *Notman v. Anchor Assurance Co.*, 6 C. B. N. S. 536; *Oldershaw v. King*, 26 L. J. Ex. 384; *Pennington v. Cardale*, 10 W. R. 544); but see *Carpenter v. Parker*, 3 C. B. N. S. 206, where the Court ordered a special case to be amended after it was set down for argument, notwithstanding the opposition of one of the parties.

Death of
parties.

As to the consequences of the death of one of the parties to a special case, see *Denison v. Holiday*, 1 H. & N. 61; *James v. Crane*, 15 M. & W. 379.

Agreement
as to error
and payment
of money
and costs,
according to
judgment
upon special
case, 15 & 16
Act, ch. 76,
sect. 47.

93. The parties may, if they think fit, enter into an agreement in writing, which shall not be subject to any stamp duty, and which shall be embodied in the said or any subsequent order, that error may or may not be brought upon the judgment of the Court on such special case (*p*), and that upon the judgment of the Court being given in the affirmative or negative of the question or questions of law raised by such special case, a sum of money, fixed by the parties, or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of such parties to the other of them, either with or without costs of the action, such agreement to be filed in the Master's office within ten days after the making thereof; and the judgment of the Court may be entered for such sum as shall be so agreed or ascertained, with or without costs, as the case may be, and execution may issue upon such judgment forthwith, unless otherwise agreed, or unless stayed by proceedings in error.

(p) Where the order as drawn up bound the parties by mistake not to bring error it was amended (*Oldershaw v. King*, 26 L. J. Ex. 384).

94. In case it is not agreed that error may not be brought upon the judgment of the Court upon such special case, either party may take such judgment into a Court of Error, in the same manner, and with all such proceedings and consequences, as to bail, costs, restitution, and otherwise, as in the case of error brought upon an ordinary judgment, and the Court of Error before which such judgment shall be brought shall have the same power to proceed and give judgment upon the question or questions of law raised by the special case as the Court in which the original judgment shall have been given (q).

Proceedings in error upon special case, 17 & 18 Vict., c. 125, s. 32.

(q) As to proceedings in error in general, see *post*, ss. 166-188.

95. In case no agreement shall be entered into as to the costs in any such special case, the costs shall follow the event, and be recovered by the successful party, who shall have execution for the same (r).

Costs to follow the event unless otherwise agreed, 15 & 16 Vict., c. 76, s. 48.

(r) When no agreement as to costs has been entered into, a plaintiff who obtains judgment for part of his claim is entitled to the general costs of the cause, and the defendant is entitled to deduct any costs which he may have incurred in respect of the matter on which he has succeeded (*Elliott v. Bishop*, 10 Ex. 522; *Gosbell v. Archer*, 5 N. & M. 523). As to the costs in case error is brought, see S. C. 1 Jur. N. S. 808.

With respect to judgment by default and to judgment on demurrer for the plaintiff, and the mode of ascertaining the amount to be recovered thereupon:

Judgment by default.

96. No rule to compute shall be necessary or used; but where the plaintiff's claim is for a debt or liquidated demand in money, with or without interest, arising upon a contract, express or implied (s), in default of such defence or demurrer filed within the time aforesaid by the defendant, it shall be lawful for the plaintiff, on filing an affidavit of the service of the writ of summons and plaint in the manner hereinbefore prescribed, or of such substituted service as may be authorized as aforesaid, and of the notice of filing the summons and plaint, if any, and certificate of no defence filed (t), to sign final judgment in the Form No. 4, in the Schedule B, to this Act annexed, on which judgment no proceeding in error shall lie (u), for any principal sum not exceeding the sum claimed by the said writ, with legal interest thereon (v),

Final judgment may be marked where demand liquidated, 15 & 16 Vict. ch. 76, sect. 27, 92 & 93.

and a sum for costs (*w*), to be fixed by the Taxing-Master of the said superior Courts, subject to the approval of the Lord Chief Justice of the Queen's Bench, and the other two Chief Judges of the said Courts, unless the plaintiff claims more than such fixed sum, in which case the costs shall be taxed in the ordinary way; but no costs of such taxation shall be allowed unless the costs so taxed shall exceed the sum so settled and approved of; and the plaintiff may, upon such judgment, issue execution: provided always, that it shall be lawful for the Court or a Judge to let in the defendant to defend upon such terms as to such Court or Judge shall seem proper (*x*).

What is a liquidated demand.

(5) A "liquidated demand in money" means such an one as the plaintiff can by calculation ascertain the amount of (*Cullen v. Moran*, 2 Ir. Jur. N. S. 28, per *Greene, B.*); and accordingly a plaintiff is entitled under the above section to mark a final judgment by default, not only in the class of actions in which before the passing of the Act a rule to compute, or, as it was commonly called, an order to tot, might have been obtained, but also, in actions for liquidated money demands, which, though not technically actions of debt, yet the basis having been first ascertained by the confession of the defendant, the amount is mere matter of calculation (*Connolly v. Teeling*, 12 Ir. C. L. R. Ap. 29, per *Fitzgerald, J.*). Thus where an action is brought against a surety upon a guarantee, the plaintiff is entitled to mark a final judgment under this section, whenever the claim against the principal is in respect of a liquidated demand; see 15 & 16 Vict. c. 76, s. 25. An action upon a judgment is an action for a liquidated demand in money "arising upon a contract" within the meaning of the present section (*Hodsoil v. Baxter*, E. B. & E. 884); and see the Statute 31 & 32 Vict. c. 54 (*post*, in the Appendix), as to obtaining execution in this country upon an English or Scotch judgment. Where an action is brought to recover a penalty given by Statute, the plaintiff is entitled mark a final judgment in case of default (*McDermott v. Sullivan*, Ir. R. 2 C. L. 312).

Work and labour.

On the other hand, where, upon referring to the bill of particulars, it is found that it contains claims which cannot be taken to have been admitted by *nil dicit* matters of controversy as to the amount of which a dispute may exist, the judgment will be interlocutory only in the first instance. Thus, where the demand is in the nature of a *quantum meruit*, as, for instance, for work and labour for which no fixed sum has been agreed to be paid, and the amount of which cannot therefore be arrived at by numerical calculation, the plaintiff is only entitled to mark an interlocutory judgment; and if a final judgment be marked it will be set aside (*Connolly v. Teeling*, 12 Ir. C. L. R. Ap. 29; *Regan v. Regan*, 4 Ir. L. T. 136). In such a case the section applicable is not the present one, but the 98th, *post*. On the same principle when an action is brought to recover the amount of a bill of costs, the plaintiff is only entitled to an interlocutory and not to a final judgment (*Shorliff v. Farrell*, Ir. R. 3 C. L. 506), with which compare *Cullen v. Moran*, 2 Ir. Jur. N. S. 28. In the case of an ordinary action on a bill of exchange, the plaintiff cannot include in the amount for which he marks a final judgment by default, the expenses of noting (*Rogers v. Hunt*, 10 Ex.

Action for costs.

474). As to recovering these expenses when the action is brought under the Summary Procedure on Bills of Exchange Act, see 24 & 25 Vict. c. 43, sect. 5, *post*, in the Appendix. And as to the cases in which the plaintiff may include interest in the amount for which he marks a final judgment, see note (v) *infra*.

The result of the authorities would, therefore, appear to be, that a final judgment by default can only be marked in those cases where the amount of the claim has been already ascertained, or agreed upon between the parties, or where the agreement or contract under which the claim arises is such that the ascertainment of the amount involves a mere arithmetical calculation, as, for instance, in the case of a sale of shop goods.

If the indorsement of particulars contains a single item not coming within the words of the section, a final judgment including the particular item will be irregular (*Connolly v. Teeling, Rogers v. Hunt, ubi supra*).

(t) The 92nd G. O. 1854, requires, in addition, that, before any judgment by default shall be marked under this or the next section, an affidavit specifying the sum actually due shall be filed. Affidavit of debt.

(u) Although the section provides that error shall not lie upon any judgment marked as above, yet, if a judgment by default be marked against an infant, to whom no guardian has been appointed, the judgment would appear to be irregular (*Jurman v. Lucas*, 15 C. B. N. S. 474); and see *M. Master v. M. Assey*, 9 Ir. C. L. R. Ap. 12; *Green v. Copland*, Bl. D. & O. 110, sect. 122, *post*, and *ante*, p. 48, note (b). Judgment against an infant.

Where a married woman sued as a *feme sole*, pleaded coverture, and no evidence being offered at the trial in support of the plea, a verdict was found against her, and she was afterwards arrested on a *ca. sa.*, it was held that she was not entitled to her discharge (*Poole v. Canning*, L. R. 2 C. P. 241).

(v) The interest contemplated by the present section, and for which a final judgment by default may be marked, is interest payable under a contract express or implied, and not interest which a jury might award as unliquidated damages; and if a plaintiff includes in the amount for which he marks a judgment, under the present section, a sum for interest to which he is not entitled by contract as above, the judgment will be set aside (*Rodway v. Lucas*, 1 Jur. N. S. 429, 311). When a final judgment by default may include interest.

As a general rule, where the contract between the parties is silent as to interest, it cannot at common law be recovered either as debt or damages; and it is no ground of exception to this rule that the instrument is in writing (*Page v. Newman*, 9 B. & C. 378), or that a day is fixed for payment (*Gordon v. Swan*, 12 East, 419), or that the contract is under seal, see *Higgins v. Sargent*, 2 B. & C. 348, 351. An agreement to pay interest will, however, be implied in the case of a bill of exchange or promissory note, or other negotiable instrument, from the time at which it becomes due. Interest may also become payable according to the course of dealing between the parties (*Bruce v. Hunter*, 3 Camp. 467). And see further as to when interest may be recovered, Leake on Contracts, p. 584.

By 3 & 4 Vict. c. 105, sect. 53, it is enacted, "that upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise than from the time when demand of payment shall

have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law; and provided also that such interest so to be allowed by such jury shall not be allowed for any period exceeding six years." And by sect. 54 of the same Act, it is provided that the jury may give damages in the nature of interest in actions of trover or trespass to goods, or in actions upon policies of assurance.

Where a party is entitled to interest under this enactment he cannot mark a final judgment by default for it (*Rodway v. Lucas, ubi supra*). In cases where a party is entitled to interest upon the sum recovered under a contract, express or implied, the plaintiff need not, it would seem, include a count for interest; it will be sufficient if prayed for by the prayer for judgment (*Walkington v. Greer*, 8 Ir. Jur. N. S. 239).

Costs of final judgment.

(w) The sum for costs pursuant to the section has been fixed by the G. Os. of Feb. 1 and Feb. 3, 1854, which see, *post*.

Setting aside a judgment.

(x) When a judgment has been regularly marked, the Court may, notwithstanding, in the exercise of its discretion set it aside upon terms. In order to induce the Court to do so, however, it is necessary that the defendant should make an affidavit of merits, and some explanation should moreover be given as to why he neglected to plead. The affidavit should in general disclose merits, and it is not sufficient to swear to them generally, as in a common affidavit of merits (*Whiley v. Whiley*, 4 C. B. N. S. 653), although there are cases in which the common affidavit has been held to be sufficient (*Murphy v. Nugent*, 6 Ir. Jur. O. S. 280; *Warrington v. Leake*, 11 Ex. 304). The affidavit should be made either by the defendant himself, or by some person who has such a connexion with the cause as acquaints him with its merits, and this must appear upon the face of the affidavit (*Daniel v. Dalton*, Hay & Jon. 346; *Jones v. Mills*, 1 Law Rec. N. S. 46; *Rowbottom v. Dupree*, 5 Dowl. 557). The judgment, moreover, will generally be set aside only on the terms of the defendant paying the costs of the application (see, however, *Reddy v. Dalton*, 10 Ir. Jur. N. S. 398), pleading forthwith, and taking short notice of trial if necessary; and if a trial has been lost, the defendant may be ordered to bring the amount of the judgment into Court.

What affidavit should state.

By whom to make.

Terms.

Where judgment irregularly marked.

On the other hand, when the judgment has been marked irregularly or *malâ fide*, and the application to set it aside is made within a reasonable time, no affidavit of merits is in general necessary (*Lenehan v. Earl of Bantry*, 4 Ir. L. R. 274; *Martin v. Williams*, 1r. R. 3 C. L. 5). A judgment will of course be set aside if the service of the summons and plaint was defective, *ante*, p. 27. And see further as to setting aside a judgment on the grounds of irregularity, Ch. Ar. Pr. 12th Ed. p. 986, and as to setting aside a judgment marked against an infant *supra*, note (v). A judgment marked while the proceedings are stayed is of course irregular, and will be set aside. The service of a notice of motion by the defendant does not as a general rule operate as a stay of proceedings. According to the practice in England, however, if a summons be taken out, and it be part of the application that further proceedings be stayed, or the application relates to the time or mode of taking the next step, as for instance an application to strike out a count, the summons, provided it be *bond fide* taken out (*Bebb v. Wales*, 5 Dowl. 458), operates as a stay, Ch. Ar. Pr. 12th Ed. p. 1601. In such cases,

While proceedings stayed. Pending a notice of motion.

however, the summons operates as a stay from the time at which it is attendable, and not from the time at which it was taken out (*Morris v. Hunt*, 2 B. & Ald. 355; *Redford v. Eadie*, 6 Taunt. 240). And see *Carroll v. Kennedy*, 2 Ir. Jur. N. S. 7. The 64th section of the present Act provides, it will be seen, that neither a demand, notice of motion, or even the order of the Court for the production, &c., of documents shall operate as a stay of proceedings, unless a special order shall be made by a Judge to that effect. By the 54th G. O. 1854, (which see) it is also provided that the service of any notice relative to the giving security for costs shall not operate as a stay of proceedings.

If, however, a judgment be marked pending a notice of motion upon which the defendant afterwards succeeds, the judgment will be set aside (*Carroll v. Kennedy*, *ubi supra*; *Stewart v. Ballance*, 10 Ir. C. L. R. Ap. 1).

97. In any action brought against two or more defendants, where the claim is for a debt or liquidated demand in money, with or without interest, as last aforesaid, if one or more of such defendants only shall appear to defend or demur, and another or others of them shall not appear to defend or demur, it shall be lawful for the plaintiff to sign judgment against such defendant or defendants only as shall not have appeared to defend or demur, and before issue joined against the other defendant or defendants to issue execution thereupon, in which case he shall be taken to have abandoned his action against the defendant or defendants who shall have defended or demurred; or the plaintiff may, before issuing such execution, proceed against such defendant or defendants as shall have filed a defence or demurrer, stating, by way of suggestion, the judgment obtained against the other defendant or defendants who shall not have filed a defence or demurrer, in which case the judgment so obtained against the defendant or defendants who shall not have taken defence or demurred shall operate and take effect in like manner as a judgment by default obtained before the commencement of this Act against one or more of several defendants in an action of debt before the commencement of this Act (y).

Where only some of the defendants take defence. 15 & 16 Vict. c. 76, s. 23.

(y) A judgment by default against one of two defendants in an action *ex contractu* is, independent of the provisions of the present section, interlocutory only, and a defence by the other defendant enures for the benefit of the defendant so suffering judgment by default. In case, therefore, the defendant who pleads succeeds in his defence, the judgment by default goes for nothing (*Morgan v. Edwards*, 6 Taunt. 398). The jury, moreover, who try the issue in fact raised by the defence must assess the damages as against all the defendants, and therefore when in such a case no notice of trial was served upon the defendant who suffered judgment by default, it was held after verdict for the plaintiff that the proceedings were irregular (*Thompson v. Shanley*, 4 Ir. C. L. R. 617). Where several parties were sued as partners, and but one took defence, the others suffering judgment to go by default, service

Judgment by default against one of several defendants.

of notice of trial and assessment of damages upon one of the defaulting parties was held to be good service on the others (*Seymour v. Donnelly*, 2 Ir. Jur. N. S. 186).

Inquiry of damages before the Master, where the claim is matter of calculation. 15 & 16 Vict. c. 76, s. 94.

98. In default of such defence or demurrer filed as aforesaid, and in case of judgment for the plaintiff on demurrer, where the plaintiff's claim is not for a debt or liquidated demand in money, but it shall appear to the Court or a Judge that the amount of damages sought to be recovered by the plaintiff, although not liquidated in its nature, is substantially a matter of calculation (z), it shall not be necessary to issue a writ of inquiry, but the Court or a Judge may direct (a) that the amount for which final judgment is to be signed shall be ascertained by the Master of the Court (b) on affidavit or by oral evidence and the attendance of witnesses; and the production of documents before such Master may be compelled by subpoena, in the same manner as before a jury upon a writ of inquiry; and it shall be lawful for such Master to adjourn the inquiry from time to time as occasion may require: provided always, that in case the said Master upon any such reference shall think it proper to have any fact controverted on the reference tried by a jury, in such case the said Master may sign a requisition to that effect, entitled in the cause, and direct the same to be delivered to the Sheriff of the County of the City of *Dublin* two days before the time when such jury shall be required, and the jurors shall be summoned and taken from the list of persons liable to serve as jurors in the County of the City of *Dublin*, and the Sheriff shall cause so many of the jurors as in his opinion he shall deem sufficient to be summoned, but not less than six, and such persons shall attend, and either party shall be entitled to his lawful challenge against all or any of the said jurors, and a jury consisting of not less than three, shall be returned to try such fact or facts as shall seem doubtful to such Master, who shall proceed to make his report on the verdict of such jury as he shall see fit, and such jury shall be sworn and paid as a common jury at Nisi Prius; and the Master shall endorse upon the rule or order for referring the amount of damages to him the amount found by him, and shall deliver the rule or order, with such endorsement, to the plaintiff, and such and the like proceedings may thereupon be had as to taxation of costs, signing judgment, and staying the signing

thereof, and otherwise, as upon the finding of a jury upon a writ of inquiry.

(z) The question of what is "substantially a matter of calculation" is one depending on the circumstances of each particular case, and no precise rule can be laid down as to what cases are and what are not within the section. The English Common Law Commissioners, on whose recommendation the corresponding section in the 15th & 16th Vict. c. 76, was introduced, seem to have considered that the damages in an action for non-repair would be substantially a matter of calculation. In *Cummins v. Birkett*, 3 H. & N. 156, an action having been brought by a succeeding rector against his predecessor to recover damages for dilapidations to the rectory house, the matter in dispute was held to be a matter of "mere account" within the meaning of sect. 3 of the English Common Law Procedure Act, 1854. The amount due for costs under a contract to pay costs is a "matter of calculation" which may be referred to the Master to inquire (*National Assurance Co. v. Best*, 27 L. J. Ex. 19) and see *Shortal v. Farrell*, 1r. R. 3 C. L. 506, for the practice in the different courts, as to ascertaining the amount for which judgment is to be marked when an action is brought to recover the amount of a bill of costs; and reference may also be had to section 6 of the Common Law Procedure Act, 1856, as to what is a matter of "mere account" within the meaning of that section.

Matter of calculation.

(a) By the Common Law Procedure Act, 1856, s. 99, it is no longer necessary to obtain an order from the court directing the Master to ascertain in the cases provided for above, the amount of final judgment, and the Master is to ascertain the amount without any such direction.

Master to ascertain the amount without an order of the Court. Where several interlocutory judgments.

Though there are several defendants and several interlocutory judgments there can be but one reference (*Field v. Pooley*, 3 M. & G. 756), and see note (y), *supra*.

Employing a surveyor, &c.

(b) Upon a compulsory reference to the Master, under section 3 of the English Common Law Procedure Act, 1854, of an action upon a building contract, it was held that, although the Master cannot delegate his authority, yet it is competent to him to inform his mind as to the amount and value of the work done by sending a surveyor in whom he can confide to view and report to him (*Gray v. Wilson*, L. R. 1 C. P. 50). The Master should not however preclude the parties from calling their witnesses if so minded.

The course of procedure upon a reference to the Master is provided for by the General Orders of 1854, 159-172, which see.

Procedure before master.

99. It shall be the duty of the Master of the Court, before he permits any such judgment by default to be marked, to see that a proper affidavit of the service of the writ of summons and plaint has been filed, and that according to such affidavit service of such writ has been effected in the manner prescribed by this Act, or in the manner substituted by the order of the Court or a Judge as aforesaid (c).

Master shall examine the affidavits of service.

(c) As to what the affidavit of service should state, see *ante*, p. 34.

100. In default of such defence or demurrer, and in case of judgment for the plaintiff on demurrer, when the plaintiff's

Ordinary writ of inquiry in other cases.

demand is not for a debt or liquidated sum in money, and where the amount of damages sought to be recovered cannot be calculated as aforesaid, it shall be lawful for the plaintiff to issue a writ of inquiry to the Sheriff of the proper county, or other person thereunto lawfully authorised (*d*), and such inquiry shall be holden at the chief town in the county, or such other place as shall be agreed on between the Sheriff and the party delivering the writ to him, who shall have ten days' notice in writing of the time and place of holding such inquiry; and notice of the holding of such inquiry shall also be given by the plaintiff to the defendant, or if judgment be given on demurrer to his attorney, ten days before the holding of same (*e*); and the said writ of inquiry may be made returnable and be returned on any day certain in term or in vacation, to be named in such writ (*f*), and upon the return thereof, and without any rule for judgment thereon, the costs may be taxed and judgment signed and execution issued forthwith, unless the sheriff or other officer before whom such writ shall be executed shall certify under his hand upon such writ that judgment ought not to be signed until the defendant or plaintiff shall have had an opportunity to apply to the Court to set aside the execution of such writ of inquiry, or unless one of the Judges of the said superior Courts of Law shall think fit to order the judgment to be stayed until a day to be named in such order (*g*); provided that where a writ of inquiry shall have been sped before a Judge, the proceedings from the finding to issuing execution shall be the same as in the case of ordinary trials at Nisi Prius.

Where venue
is in Dublin.

Where venue
in the coun-
try.

Where several
defendants.

Inquiry
before the
Chief Justice.

(*d*) If the venue be in the County or City of Dublin, the Master of the Court is the person to assess the damages pursuant to the next section of the present Act, and s. 99 of the Common Law Procedure, 1856, which see. If the venue be laid in any other county the court has now got power under the Common Law Procedure Act, 1856, s. 99, to direct that the inquiry shall be sped before the Master of the Court and a jury of the city of Dublin. An application to the Court for this purpose must be upon notice, and otherwise only a conditional order will be given (*Duff v. Miller*, 2 Ir. Jur. N. S. 209; *Honohan v. Ahern*, 6 Ir. C. L. R. 141).

The writ of inquiry must be against *all* the defendants, and if the plaintiff were to execute separate writs against each defendant, the proceedings would be irregular (*Mitchell v. Milbank*, 6 T. R. 199).

Under special circumstances the writ may be executed before the Chief Justice of the court at Nisi Prius, or the Judge of Assize. An order may also be obtained that the inquiry, whether before a judge or the sheriff, shall be by a special jury (62nd G. O. 1854). It is only, however, where some difficult

point of law, or nice question of evidence, is likely to arise, or where the cause is of great importance, that this indulgence will be granted (*Byrne v. Martin*, 1r. R. 4 C. L. 88; *Garrick v. Bradshaw*, 10 Ir. L. R. 134); and see *Naghten v. Harrison*, 3 Ir. L. R. 286, *Redmond v. Lavelle*, 1 Jones, 454. The application must be upon notice (*O'Connell v. O'Callaghan*, 10 Ir. L. R. 112).

If the inquiry be by a "good" or special jury, the jury are entitled to be paid as special jurymen (*Vickery v. London B. & S. C. R. Co.*, L. R. 5 C. P. 165).

The Sheriff may by consent appoint a legal assessor to act for him upon the inquiry (*Slevin v. Manders*, 1r. R. 2 C. L. 659). Deputy.

(e) The form of the notice of speeding the inquiry is provided for by the 60th & 61st General Orders, 1854, which see. If either party attend by counsel, a two days' notice in writing should be given thereof to the opposite party, (60th General Order). As to countermanding notice of inquiry, see *post*, s. 104. Notice of inquiry.

In a joint action, although it is better to serve the notice on both defendants, yet service on one has been held to be sufficient (*Seymour v. Donnelly*, 2 Ir. Jur. N. S. 186; *Figgins v. Ward*, 2 Dowl. 364; *Amlott v. Evans*, 7 M. & W. 462). How served.

Service of the notice of inquiry may be substituted, as in *Anon. v. Smith*, 6 Ir. Jur. O. S. 47, where service upon a defendant, who had neither a land agent nor attorney within the jurisdiction, was allowed to be substituted by serving a brother-in-law with whom he was in communication. See also *Uniacke v. Howard*, Batty, 436, where defendant not having appeared, a notice of inquiry was held to be unnecessary.

(f) It must be made returnable within three months from the day of issuing it (59th G. O. 1854).

(g) If the sheriff or other officer give a certificate pursuant to the Statute, the defendant must serve notice of motion to set aside the inquisition within ten days after speeding the inquiry, otherwise the plaintiff may proceed as though there were no such certificate (63rd General Order 1854). And in case the officer refuses to give a certificate, the defendant must at once give notice of his intention to apply to a Judge and serve his notice of motion in six days (64th G. O. 1854). When such notice of intention is given, the opposite party cannot proceed to sign judgment for six days after the day of finding. Setting aside the inquisition.

Upon moving for a new inquiry it will be sufficient to produce the sheriff's notes verified by affidavit (*Stevens v. Pell*, 2 Dowl. 629; *Lathbury v. Brown*, 10 Moore, 106); or if a misdirection by the sheriff is relied on, the Court can hear from the counsel in the cause a statement as to what passed at the trial (*Jones v. Lewis*, 9 Dowl. 145, per Coleridge J.). A motion to set aside an inquiry on the grounds of the damages being too great or too small will not be granted unless a strong case be made out (*Slevin v. Manders*, 1r. R. 2 C. L. 659; *Magee v. Gefney*, Hayes & Jon. 730). As to setting aside a perverse verdict, see *Weeding v. Mason*, 2 C. B. N. S. 382; *Bible v. Hussey*, 2 Ir. L. T. 283.

101. It shall be lawful for the Court or a Judge, in any case in which the venue in the action shall be laid in the county or county of the city of *Dublin*, instead of a writ of inquiry to the sheriff to ascertain the amount of damages, to direct that the amount for which final judgment shall be Inquiries may be holden before Master of the Court when venue in Dublin.

marked shall be ascertained by the master of the Court (*h*), and thereupon such damages shall be ascertained by the Master in like manner as such damages have been heretofore ascertained under writ of inquiry by the sheriff; and for such purpose it shall be the duty of the sheriff (*i*) to summon jurors to attend before the said Masters, who shall have the like jurisdiction and authority as have been heretofore exercised by sheriffs in holding such inquiries: Provided always, that whenever there is any such trial by jury six jurymen shall be impanelled and sworn as occasion shall require to give their verdict according to the evidence, and the verdict of the said jurymen shall, if unanimous, be sufficient; and it shall be lawful for the Master to adjourn such inquiry from time to time as occasion may require; and the Master shall endorse on the rule or order of reference the finding of the said jury, and shall deliver the same to the plaintiff, and such and the like proceedings may thereupon be had as to taxation of costs, signing judgment, and otherwise, as upon a finding of a jury upon a writ of inquiry to the sheriff.

(*h*) It would appear that the jurisdiction of the sheriff of the city or county of Dublin is not taken away by either the present Act or the Common Law Procedure Act, 1856, s. 99 (*Segrave v. Duffy*, 10 Ir. C. L. R. Ap. 27). Under s. 99 of the Common Law Procedure Act, 1856, it is now unnecessary to obtain an order directing the writ of inquiry to be sped before the Master.

Where
sheriff defend-
ant.

(*i*) When the sheriff is defendant it would appear that the jury are to be summoned by the coroner (*Cassidy v. St. Lawrence*, 6 Ir. Jur. O. S. 315).

Issues and
abstract for
Nisi Prius.

With respect to the settlement of the issues and abstract for *Nisi Prius*:

Abstract of
issues for
Nisi Prius to
be settled by
a Judge.

102. After defence or last subsequent pleading filed, and together with the notice of trial (*j*), the plaintiff's attorney shall furnish to the defendant's attorney a draft of the abstract of the pleadings and of the issues in fact to be tried at *Nisi Prius*, according to the Form No. 5 in the Schedule B. to this Act annexed (*k*); and in case the defendant shall not return the same, approved of, within four days from the delivery thereof, the plaintiff may take out a summons to settle the same before a Judge (*l*), who shall, subject to an appeal to the Court, settle the same (*m*), and shall have power to adjudicate on the costs of such settlement; and such abstract, so agreed upon or settled, shall be lodged with the pleadings assistant of the Court, and an engrossment of such abstract, so agreed on or settled, and prepared by the plain-

tiff's attorney, shall be in place of the record of *Nisi Prius*, and the *postea* and all other proceedings at the trial shall be endorsed thereon, and shall be returnable in the like manner as heretofore in respect of the *Nisi Prius* record (n).

(j) When the pleadings are concluded, the plaintiff's attorney should make up and furnish to the defendant's attorney an abstract of the pleadings in fact. From the above section, it would appear as though the abstract and notice of trial should be served together; however, by the 2nd G. O. of 22nd January, 1856, the abstract may now be served before the notice of trial. It cannot, however, be served after the notice of trial, and should the notice of trial be served before the abstract it will be irregular (*Mulligan v. Chute*, 6 Ir. Jur. O. S. 319). In cases where the plaintiff files a replication, he may in general serve the abstract as soon as the replication is filed (see *Furlong v. Garrett*, 2 F. & F. 48). Where to an action for receiver's fees, the defendant pleaded a judgment of the Court of Queen's Bench in his favour in a former action, to which the plaintiff replied that the judgment was one on demurrer which did not go to the merits of the cause, the Court allowed the plaintiff to enter a rule requiring the defendant to rejoin or demur in four days or else judgment (*Blount v. Evans*, 7 Ir. C. L. R. 97); and the Court in that case intimated that the provisions of the present Act as to making up and settling issues do not apply to the case of a plaintiff replying a record.

The abstract and issues.

Where issue not triable by jury.

(k) The abstract will consist of a transcript of the pleadings and of the issues arising thereon. A copy of the particulars of the plaintiff's demand and of defendant's set-off (if any) must be annexed to the abstract for *Nisi Prius* at the time of lodging the same with the Judge's Registrar, (55th G. O. 1854). The manner in which the abstract is to be engrossed is provided for by the 34th G. O. 1854.

Form of abstract.

(l) If the defendant fails to return the abstract, or if the issues are altered by the defendant in a manner which the plaintiff is unwilling to accede to, the plaintiff's course under the above section will be to take out a summons to settle issues. By the 74th G. O., 1854, in cases where it becomes necessary to take this step, the attorney for the plaintiff is to lodge with the Clerk of the Rules a correct copy of the draft abstract of the pleadings and of the issues proposed as theretofore furnished; and the Clerk of the Rules will thereupon issue a summons for such time and place as the Judge shall approve. When the issues are settled in term, inasmuch as the settlement takes place before a Judge and not before the Court, the summons will not be listed, and the matter will be disposed of before the motions upon notice are gone into. The issues may be settled before a Judge on circuit, and if therefore the defendant fails to attend upon such settlement and a trial is had he cannot afterwards set aside the proceedings for irregularity (*Murphy v. Toohey*, 3 Ir. C. L. R. 226). Where a defendant appeals from the issues as settled by a judge, he is not entitled to a postponement of the trial or a stay of execution or verdict and judgment when the Judge at the trial approves of the issues (*Bosshell v. Anderson*, 6 Ir. C. L. R. 1). Senior counsel cannot attend upon a settlement of issues on behalf of either party, unless the party on whose behalf he attends is also represented by junior counsel (*Dunne v. Gumley*, 8 Ir. C. L. R. Ap. 6; *Howley v. Richey*, 5 Ir. Jur. N. S. 348).

Summons to settle issues.

(m) The abstract, as before remarked, should contain a transcript of the pleadings, and if the abstract as furnished be defective or irregular, the

Settling abstract.

Judge will settle the abstract as well as the issues (*Bergin v. M'Dowell*, 6 Ir. C. L. R. 274). The abstract may also be amended at any time before the trial by the Court or a Judge. See *post*, s. 231. It may also be amended by the Judge at Nisi Prius, pursuant to the same section. If the abstract be improperly altered by the plaintiff after it has been settled, he will not be allowed to retain a verdict obtained upon it (*Suker v. Neale*, 1 Ex. 468).

Form of issue In tendering or settling issues, either party may of course insist on such a construction of the language of his adversary's pleading as it fairly imports, and if the language be equivocal, he has a right to insist that its meaning be ascertained by the language of the issue (*Ruckley v. Kiernan*, 7 Ir. C. L. R. 75, 80). As to the form of the issues in an action of slander where the defence traverses the speaking of the words complained of, see *Knight v. Lynch*, 9 Ir. C. L. R. Ap. 11, in which case it was held that the plaintiff was entitled to an issue "whether the defendant spoke or published the words, or any, and which of them as alleged." As to the issues in libel, when the defence traverses that the words were spoken of and concerning the plaintiff in his trade and business, see *Boshell v. Anderson*, 6 Ir. C. L. R. 1. As to the issues in an action for false imprisonment, see *Cantwell v. Cannock*, 3 Ir. C. L. R. 78 and in ejectment for non-payment of rent, *Murphy v. Toohey*, 3 Ir. C. L. R. 326, with which latter case compare *Keene v. M'Blaine*, and the other cases cited at p. 85, *ante*. There should not be an issue as to damages, except in cases where special damage is the gist of the action (*Cantwell v. Cannock*, 3 Ir. C. L. R. 78; *Custis v. Sandford*, 4 Ir. C. L. R. 197).

Where issue mixed of law and fact,

When the issue raised by a pleading is a mixed question of law and fact, it is properly triable by a jury (*Ward v. Freeman*, 2 Ir. C. L. R. 460, 507); but where the issue raised is one wholly of law, no issue it would appear should be settled under this section (*Blount v. Erans*, 7 Ir. C. L. R. 97), and see *King v. Hoare*, 13 M. & W. 494; *Boyce v. Webb*, 15 Q. B. 84.

Costs.

When the parties are unable to agree as to the form of the issue, and there is any substantial question between them, the costs will generally be made costs in the cause. As to the allowance of fees to counsel for settling issues, see *Bewley on Costs*, pp. 38, 39.

Form of abstract when judgment by default against one of several defendants.

(*) Where in an action for an unliquidated demand against several defendants one of the defendants allows judgment to go by default, and the other defendants take defence, the abstract should state the recovery of the interlocutory judgment by default, and in addition to serving the ordinary notice of trial on the other defendants, notice should be served upon the defendant who has not pleaded, that upon the trial of the cause the jury will assess damages against him in respect of the judgment by default (*Thompson v. Shanley*, 4 Ir. C. L. R. 617).

Time for notice of trial and inquiry. 15 & 16 Vict. c. 76, s. 97, Reg. Gen. H. T. 1853, r. 35.

103. Ten days' notice of trial or inquiry shall be given, and shall be sufficient in all cases, whether at Bar or Nisi Prius, in town or country, unless otherwise ordered by the Court or a Judge (o), and the expression "short notice of trial" in any order or consent shall be taken to mean four days (p).

Notice of trial.

(o) Notice of trial must be given in all cases where there is an issue to be tried by a jury, except where a town cause is made a *remanet* from one sittings to another (*M'Intyre v. Somers*, 14 M. & W. 102, 103; *Crockford v. Tucker*, 18 L. J. Q. B. 114); or where a cause is put off by an order of

Nisi Prius (*Shepherd v. Butler*, 1 D. & R. 15); or by a Judge's order from one sittings to another (*Claudet v. Priuce*, L. R. 2 Q. B. 406). It must be given where the cause has been made a *remanet* at the assizes (*Gains v. Bilson*, 4 Bing. 414), or where a new trial has been granted (*Bingley v. Mallison*, 3 Dougl. 402); and in the cases mentioned above, though it is not necessary to give notice, yet it will be the more prudent course to give it, and where it is intended to have the case tried by a special jury an embarrassment may arise if notice be not given.

The notice should be in writing, but no particular form is necessary to constitute a valid notice (*Ginger v. Pycroft*, 17 L. J. Q. B. 182), and where a notice of trial was served on the 25th of May, for the trial of the cause before the Judge presiding in the Consolidated Nisi Prius Court for Thursday the 7th day of May, it was held that inasmuch as the defendant must have known that the 7th June was the day actually intended, the notice being correct in every other respect, it was sufficient; and a motion to set it aside was refused with costs (*Graham v. Brennan*, 11 Ir. C. L. R. Ap. 17); as to the form of notice of inquiry before the Master, Sheriff, or a Judge, see the 60th and 61st G. Os. 1854.

Form of notice.

The Statute requires, ten days notice of trial to be given. In reckoning the ten days, Sunday is to be excluded, but all the other holidays are to be included (s. 232, *post*, *Kennan v. Garde*, 3 Ir. C. L. R. 20), and the time is to be reckoned exclusive of the day of service, but inclusive of the last of the days. When the trial is had during term, notice may be served for any of the days therein, but when the trial is had at the aftersittings, the notice must be served for the first day of the aftersittings, and so, also when the trial is had at the Assizes; and where the last day for serving notice of trial for the Hilary aftersittings was the 20th January, and on the 23rd January a notice was posted that the Nisi Prius sittings of the Court would not commence until February 6th, a notice of trial for the ensuing aftersittings, served on the 23rd January, was held to be irregular, and was set aside (*Du Moulin v. Druitt*, 5 Ir. Jur. N. S. 168), with which compare *Cox v. Kernan*, 5 Ir. Jur. O. S. 233. Where indeed the defendant has been guilty of a breach of good faith, or where the Court think it for the advancement of justice, they may compel the defendant to accept short notice of trial, or even make an order deeming a notice of trial irregularly served for the Consolidated Court a good notice of trial for the aftersittings (*Waldron v. Parrott*, 8 Ir. C. L. R. App. 50).

Form of notice of inquiry.

Length of notice.

The notice must be served upon the attorney in the cause, or on the defendant if he has appeared in person, and it would follow from s. 39 of the Act that service at the residence, &c. indorsed upon the defence will be sufficient. It must be served before nine o'clock at night, 128th G. O. 1854. And where no proceedings have been taken in the action for a year, and a day, the plaintiff must serve a rule for liberty to proceed pursuant to the 178th G. O., before serving notice of trial; and see *McMahon v. Ellis*, 12 Ir. C. L. R. 437, as to what is a proceeding in the cause. Where in an action for unliquidated damages there are several defendants and some of them have allowed judgment to be marked by default, and others have taken defence, notice must be served upon the defendants so suffering judgment by default to assess damages against them at the trial in respect of the judgment by default. In an action for a liquidated demand, however, when a final judgment by default has been marked against some of the defendants, it is unnecessary to serve them with notice of any further

On whom to be served.

Where several defendants.

proceedings against defendants who have pleaded (*Thompson v. Shanley*, 4 Ir. C. L. R. 617). And where the defendants are sued as partners, service of the notice of trial on the defendants who take defence will be deemed good service upon the others (*Seymour v. Donnelly*, 2 Ir. Jur. N. S. 186).

There seems to be no objection to a plaintiff withdrawing a bad or defective notice of trial and giving a fresh valid one, if there be time for that purpose (*Fell v. Tyne*, 5 Dowl. 246; *Ranger v. Bligh*, *ib.* 235). And if the first notice be void, a new notice may be served without countermanding the first (*Fell v. Tyne*, *ubi supra*).

How defect
in notice
taken advantage of.
Waiving defect.

The Judge at the trial will not in general refuse to hear a cause on an objection that due notice of trial has not been given, that being a ground for an application to set aside the verdict (*Byrne v. Hogan*, Arm. Mac. & Og. 170); and a defendant by appearing and defending the action at the trial thereby waives any irregularity in or even the want of notice (*Doe v. Sepson*, 3 B. & Ad. 402; *Younge v. Fisher*, 4 M. & G. 814). An irregularity in the notice will be also waived by the defendant obtaining after service of the notice of trial an order for a special jury (*Beresford v. Geddes*, L. R. 2 C. P. 285). In *Waldron v. Parrott*, 8 Ir. C. L. R. App. 50, a plaintiff served notice of trial for the Consolidated Nisi Prius Court, and the defendant made no objection to the notice, but appeared at the trial, and objected that the Judge had no jurisdiction to try the case in the Consolidated Court, and the Court under the circumstances ordered the defendant to accept short notice of trial for the ensuing after-sittings. When the notice of trial served is irregular, although the Court may on the application of the defendant set aside the notice, it may on the other hand decline to interfere and allow the plaintiff to go on at his own peril, 1 Ch. Ar. Pr. 12th Ed. p. 318.

Pending appeal.

Where an appeal was pending to the Court of Error by the defendant from an order of the full Court which had set aside a verdict had for the defendant and awarded a *venire de novo*, an order was made by a Judge in Chamber restraining the plaintiff from proceeding to act upon a notice of trial which he had served for the ensuing assizes (*Whalley v. Masserene*, 7 Ir. Jur. N. S. 323), and see further S. C. *sub nom.* *Carlisle v. Whaley*, L. R. 2 H. L. 391, 407. In *Callan v. Marum*, Q. B. H. T. 1871, the Court of Queen's Bench under similar circumstances declined to interfere.

Short notice of trial.

(p) The order of the Judge or Court imposing the terms of taking short notice of trial generally adds the term "if necessary." The defendant in such a case is not bound to accept short notice unless it becomes necessary; and it is not so if the plaintiff is guilty of unnecessary delay (*Drake v. Pickford*, 15 M. & W. 607; *Dignan v. Ibbotson*, 3 M. & W. 431); the term "if necessary," means if such short notice shall be rendered necessary in consequence of the grace given (*Woolley v. Aldratt*, 17 L. T. N. S. 120). In *Cox v. Kiernan*, 5 Ir. Jur. O. S. 233, the defendant had been ordered by an order of the 28th January to accept short notice of trial for the Nisi Prius sittings. The plaintiff served notice of trial on the 3rd February, the defendant refused to appear at the trial, on the grounds that he had not got sufficient notice of trial, and a verdict was given for the plaintiff; and it was held on a motion for a new trial that this notice was sufficient, and the verdict for the plaintiff was upheld.

Notice of countermand 15 & 16 Vict. c. 76, s. 58.

104. A countermand of notice of trial or inquiry may be given four days before the time mentioned in the notice, unless short notice of trial or inquiry has been given, and

then two days before the time mentioned in the notice of trial or inquiry, unless otherwise ordered by the Court or a Judge, or by consent (g).

(g) Where a plaintiff seeks to countermand notice of trial or inquiry, the notice should be given the required number of days before the *first day* of the sittings or assizes (*Cooper v. Whitmarsh*, 4 M. & W. 73). It must be given to the defendant's attorney where he defends by one, and in such a case notice to the defendant himself will not be sufficient (*Margetson v. Rush*, 3 Dowl. 388). When a cause has been made a *remand*, notice of trial cannot in general be countermanded (*Tempang v. Rigby*, 10 Ex. 476); but where the cause is made a *remand* at the request of the defendant, notice of trial may be countermanded (*Sally v. Noble*, 1 H. & C. 809).

Countermand of notice.

Even in cases where the plaintiff is late for serving notice of countermand, he should, in cases where he does not intend to proceed to trial, serve the defendant with notice of his intention not to proceed, in order to prevent further costs being incurred; and if the defendant after service of such notice incurs any further expense, he will not be entitled to the costs of same (*Tottenham v. M'Guiney*, 9 Ir. Jur. N. S. 287).

Where countermand late.

After the jury has been sworn, the plaintiff cannot, except by consent, withdraw the record; and unless he go on he must be nonsuited (*Swift v. Swift*, 3 Ir. C. L. R. 218, *Lee v. Butler*, Arm. Mac. & Og. 93).

105. A rule for costs of the day for not proceeding to trial or inquiry pursuant to notice, or not countermanding in sufficient time, may be drawn up on affidavit, without motion (r), at any time within one month (s) after the day of trial or inquiry fixed by the notice of trial or inquiry, and if such rule be not entered within said period, such costs shall be costs in the cause (t); provided however that such rule shall, so long as it remains in force, be an answer to any application in respect of any default in proceeding to trial.

Costs of the day, 15 & 16 Vict. c. 76, s. 99, Reg. Gen. H. T. 1853, r. 39.

(r) When the plaintiff fails to proceed to trial pursuant to notice, and has not countermanded the notice of trial in proper time, the defendant may enter as of course a rule pursuant to this section, and in case the plaintiff has any good excuse for not going to trial, his only course is to move the Court to discharge the rule.

Rule for costs of the day.

When the defendant has entered a rule under the above section, he will be entitled to such costs as he has incurred by reason of the plaintiff not having proceeded to trial, and such costs will be the same as the costs upon a withdrawal of the record (*Walker v. Lane*, 3 Dowl. 504). The costs of the day in such cases include the costs of issuing and serving subpoenas, vaticums and expenses of witnesses, the attendance fee of the attorney, and refreshing fees to counsel. Where a cause has been made a *remand*, the costs to be paid will be the costs of the day of the second sittings, and will not include the costs of the first sittings (*Waters v. Weatherby*, 3 Dowl. 328; *Brett v. Stone*, 1 D. & L. 140). Where notice of trial was served for the Consolidated Nisi Prius Court in a case which did not come within the class

What costs defendant entitled to.

Where notice irregular.

enumerated in sect. 237, *post*, and in consequence of the want of jurisdiction the case remained untried, it was held, notwithstanding the want of jurisdiction, that the defendant was entitled to the costs of the day (*Murphy v. McCay*, 6 Ir. Jur. O. S. 312).

Where record
has been
lodged.

In case the plaintiff serves a notice of trial which he does not withdraw, and lodges the record, but afterwards makes default in going to trial, the proper course for the defendant to adopt is to attend at the trial, have the jury sworn, and obtain a nonsuit, which will have the effect of terminating the action; and if the defendant, instead of adopting this course, does not appear at the trial, and is in the same default as the plaintiff, he will not be entitled to the costs of the day. Thus, where both parties were absent when the case was called on, the defendant was held not to be entitled to the costs (*Morgan v. Fernyhough*, 11 Ex. 205; *Warne v. Hill*, 7 C. B. N. S. 726). In the latter case it was stated (p. 730) that the defendant, when the plaintiff does not appear, may adopt one of two courses: he may either have the jury sworn, and claim a nonsuit, or, without having the jury sworn, he may apply to have the cause struck out, and in either case he will be entitled to the costs of the day; however, in *Smith v. Marshall*, 33 L. J. Q. B. 332, it was laid down that, in order to secure the costs of the day, the defendant must have the jury sworn, and claim a nonsuit; and if he do not, he is not entitled to them; and see further *Leech v. Gibson*, 10 W. R. 354. When the plaintiff, after having given due notice of trial, does not lodge the record, or withdraws it without due notice of countermand, the defendant is of course entitled to the costs of the day. In *Sleeman v. Copper Miners of England*, 5 D. & L. 451, the defendants refused to consent to allow the record to be amended, which was then withdrawn, and the Court refused them the costs of the day; with which case compare *Cook v. Smith*, 1 Dowl. N. S. 861; *Skinner v. London and Brighton Railway Co.*, 4 Ex. 885. As to the costs of the day, when the plaintiff is prevented from trying by an accident happening to a material witness, see *Ogle v. Moffatt*, Barnes, 133, *Pope v. Fleming*, 5 Ex. 249. In *Pell v. Lennell*, L. R. 3 C. P. 441, it was held that where a plaintiff has a reasonable excuse for not proceeding to trial pursuant to notice, and has been guilty of no default, the defendant is not entitled to the costs of the day. In that case an action had been brought against *A. & B.*, and notice of trial was served for the Bristol Assizes, which commenced on the 13th of August. On the 10th, Saturday, the plaintiff's attorney became aware that *B.* was dead. No suggestion was entered on the record, and on the 12th the plaintiff gave a notice by telegram that he did not mean to try at those assizes. Notwithstanding this notice, *A.* attended with his witnesses at Bristol. The plaintiff did not appear; and it was held that the plaintiff had not been guilty of such default as to entitle *A.* to the costs of the day. If the jury be improperly tampered with by the defendant, or be prejudiced, the plaintiff will not be liable to the costs of the day in case he withdraws the record (*Atkinson v. Mills*, 9 Ir. Jur. N. S. 250; and see *Mullins v. Anon.*, 5 Taunt. 88).

Grounds of
excuse.

Rule operates as a
stay.

In England the rule is not a stay of proceedings, nor will the Court, unless under peculiar circumstances, make it a part of the rule that the payment of the costs shall be a condition precedent to ulterior proceedings: Ch. Ar. Pr., 12th Ed. p. 1495. In this country, however, the rule which the defendant is entitled to enter up pursuant to the above sections provides that the proceedings shall be stayed until the costs of the day are paid (*Murphy v. McCay*, 6 Ir. Jur. O. S. 312). When a rule for the costs of the day has been entered the defendant cannot take proceedings under the 106th sect. without dis-

charging the rule (*Raleigh v. Raleigh*, 5 Ir. L. R. 182; *Dawson v. Loughnan*, Bl. D. & O. 46; *M'Cammon v. Neeson*, 2 Huds. & Br. 153); and cf. *Anderson v. Walsh*, Ir. R. 3 C. L. 97; *Fielden v. Donagh*, 8 Ir. C. L. R. Ap. 45). As to what acts on the part of the defendant will amount to a waiver of the benefit of the rule, in so far as it stays the proceedings, see *Deering v. Palmer*, 6 Ir. L. R. 209, where it was held that the circumstances of the defendant having before the costs were taxed and certified applied for a special jury, and the service of a notice for the admission of documents at the trial, constituted a waiver by him of the benefit of the rule.

The costs to which a defendant is entitled by reason of the plaintiff's default in not going to trial, will not pending the cause be made payable out of money lodged by the plaintiff in Court in lieu of security for costs (*Tupper v. Dawson*, 7 Ir. Jur. N. S. 325).

(s) Vacation is to be included in the computation of time within which the rule is to be entered; and when that time has elapsed, the Court has no authority to allow the rule to be entered (*M'Kinney v. Reynolds*, 6 Ir. C. L. R. 133). Computation of time.

(t) Where the plaintiff withdraws the record, and the defendant omits within a month to enter a rule for the costs of the day, and the plaintiff ultimately succeeds in obtaining a verdict, he should not as a matter of course be allowed in the Taxing Office the costs of withdrawing his own record, although in an extreme case it would be competent to the Court to make the defendant pay them (*Atkinson v. Mills*, 9 Ir. Jur. N. S. 250). Where rule not entered.

With respect to default in not proceeding to trial (u):

106. The plaintiff shall proceed to trial within three terms (v) from that in which, or the vacation of which, the defence or other subsequent pleading is filed; and in default thereof (w) the defendant (x) may enter a rule that the plaintiff do proceed to trial at the assizes or sittings next after the expiration of twenty days from the service of such rule (y), and that in default the defendant shall be dismissed with his costs of the suit (z); and if the plaintiff neglects to proceed to trial in pursuance thereof (a), the defendant, on filing an affidavit of the service of such rule, and that the plaintiff has failed to proceed to trial in pursuance thereof, may enter a peremptory order for the payment of his costs of the suit (aa), which order shall be in lieu and shall have the effect of a judgment as in case of a nonsuit; and the defendant on producing such order shall have the pleadings in the cause removed into the office of the Master of the Court for the purpose of having execution thereon, and shall have execution accordingly; provided, however, that the Court or a Judge shall have power to extend the time for proceeding to trial, with or without terms (b).

Default in going to trial.

Order for costs for not proceeding to trial, 15 & 16 Vict. c. 76, s. 102.

(u) The plaintiff is bound under the above section to proceed to trial within three terms from that in which, or the vacation of which, the defence Proceeding to trial.

Defendant's
remedies.

or other subsequent pleading is filed, unless the time for so proceeding be extended by the Court or a Judge. When the prescribed period has elapsed, and no notice of trial has been served, there are two courses open to the defendant. He may either proceed to rule the plaintiff in the manner pointed out above, or he may take down the cause for trial by *proviso*. At Common Law the only right of the defendant was to take down the cause for trial by *proviso* (see *post*, p. 121); but by the 28th Geo. 3, c. 31, s. 2 (repealed by the present Act), the further right was given to the defendant of obtaining a judgment as in case of a nonsuit against a plaintiff who was guilty of neglect in not bringing on an issue to be tried, and by the above section a similar right is conferred upon him. The effect of a rule entered under the above section is the same as that of a judgment of nonsuit, and will not, therefore, be an answer to a fresh action, while, on the other hand, a verdict upon a trial by *proviso* is conclusive between the parties. A trial by *proviso* is, however, seldom had recourse to except in cases where the defendant is particularly anxious that the cause should be finally disposed of.

Course to be
adopted by
plaintiff.

When the defendant has ruled the plaintiff under the above section to proceed to trial, the plaintiff, if he has any grounds upon which to apply to the Court to rescind or vary the rule, should apply by motion. Under the old practice, if the plaintiff had once proceeded to trial, a judgment as in case of a nonsuit could not be entered up against him, notwithstanding a subsequent default, and in such cases it would appear that no rule can be entered up under the present statute either, *infra*, note (w). Again, the plaintiff may show in another class of cases that the rule has been prematurely entered or that under the circumstances of the case the Court should not allow it to stand (*infra*, note (z)); and in a third class of cases, although the rule has been regularly entered up, yet the plaintiff may have just grounds to apply for an extension of the time for going to trial, (*infra*, note (b)). When the plaintiff does not intend to show cause against the rule, or to apply for an extension of the time, he should serve notice of trial in the usual manner. If after being ruled, he fails in going to trial, there are some cases (note (a), *infra*), in which he may notwithstanding apply to the Court to discharge the peremptory order for payment of costs which the defendant is authorized to enter up under the above section.

How time
computed.

(v) When the defendant has obtained an order staying the proceedings in the cause, the time during which the proceedings are so stayed is not to be included in the computation of the period above mentioned (*Anderson v. Walsh*, Ir. R. 3 C. L. 97; *Fielden v. Donagh*, 8 Ir. C. L. R. Ap. 45); and it is in such a case further necessary that three consecutive terms should elapse (*Anderson v. Walsh*, *ubi supra*); and see further, note (z), *infra*.

It was held under the former Statute, that where there was an issue both in fact and in law, time did not commence to run until the issue in law was disposed of (*Crisp v. Atwell*, 1 L., M., & P. 454).

In case of
death of parties.

As to the means of compelling the plaintiff or his representative to proceed with the action in case of the death of one of the parties, see sect. 93 of the Common Law Procedure Act, 1856.

Where cause
once brought
to trial.

(w) Under the old practice, when a plaintiff had once brought on the issue to be tried, and the trial had proved abortive, or had not proceeded from causes other than his neglect, a judgment as in case of a nonsuit could not be entered against him, although he failed to proceed further with the case. Thus, if the plaintiff in a country case had taken the cause down for trial, and it had been made a *remanet*, the defendant could not have had a judgment

under the Statute (*Brown v. Rudd*, 1 Dowl. 371; *Mewburn v. Langley*, 3 T. R. 1; *Wright v. Hodgens*, 1 Ir. L. R. 268). The defendant's only remedy in such a case was to take the case to trial by *proviso* (*Williams v. Stewart*, 4 Law Rec. N. S. 171). It was otherwise, however, in a town cause (*Gadd v. Bennett*, 2 B. & Ald. 709; *Ladbroke v. Williams*, 3 D. & L. 368; *Collier v. Jones*, 1 Huds. & Br. 321); but see *Wright v. Hodgens*, 1 Ir. L. R. 268. Where, however, the plaintiff withdrew the record, the defendant might have obtained a judgment against him under the Statute (*Graydon v. Reardon*, 1 Ir. L. R. 355; *Gillman v. Connor*, 1 Jebb & Sym. 673), unless the withdrawal was at the instance of the defendant (*Clarke v. Callaghan*, 1 Ir. L. R. 345; *Anon.*, 2 Ir. L. R. 167). And where the plaintiff took the cause down for trial, and was nonsuited, and the nonsuit was afterwards set aside (*King v. Pippett*, 1 T. R. 492; *Ashley v. Flaxman*, 2 Dowl. 697), or had a verdict, and a new trial was afterwards granted (*Ivers v. Browne*, 5 Law Rec. N. S. 32; *Porzelius v. Maddocks*, 1 H. Bl. 101), it was held that the defendant was not entitled to a judgment as in case of a nonsuit, inasmuch as after the plaintiff has once tried the cause he could not be compelled under the Statute to proceed to trial again. And it would appear that, in cases where the defendant was not entitled to judgment as in case of a nonsuit before the present Act, he cannot now compel the plaintiff to proceed to trial under the above section: Ch. Ar. Pr., 12th Ed. p. 1500; Day's Common Law Procedure Act, 3rd ed., p. 94.

(x) One of several defendants may enter a rule under this section, and the rule will operate for the benefit of all; and this is so even in cases where judgment by default has been marked against the other defendants (*Henry v. Flannery*, 2 Ir. C. L. R. 650; *Jones v. Gibson*, 5 B. & C. 768; *Powerscourt v. Brislin*, 4 Ir. L. R. 283).

Where several defendants.

(y) The twenty days may include the ten days which the plaintiff will require for his notice of trial (*Judkins v. Atherton*, 3 E. & B. 987); and the plaintiff should therefore take care to serve his notice of trial in proper time, without waiting for the expiration of the twenty days.

Entering the rule.

The rule may be obtained as of course in the office, without any application to the Court (*Irwin v. Landon*, 6 Ir. Jur. O. S. 315). When more than a year and a day has elapsed since the filing of the defence without any proceedings having been taken, and no compromise is depending, the defendant, before entering the rule, must enter a rule for liberty to proceed pursuant to the 178th General Order, 1854 (*Marsh v. Williams*, 7 Ir. C. L. R. 99; *Gardiner v. Gardiner*, 14 Ir. C. L. R. Ap. 31); and see *Rutledge v. Rutledge*, 3 Ir. L. R. 102; *Metcalfe v. Hetherington*, 3 H. & N. 755. Where after the defence had been filed, an order of reference had been obtained under sect. 6 of the Common Law Procedure Act, 1856, under which no proceedings had been taken, and the affidavit on which the rule was obtained made no mention of the order, the rule was set aside with costs (*Oliver v. Davies*, 1 Ir. L. T. 83).

(z) When the rule in question has been entered by a defendant, the plaintiff may apply to the Court to discharge the rule, if he has any just grounds of excuse for not going to trial, or if the rule has been prematurely entered, or he may apply to have the time for proceeding to trial extended, as to which see *post*, note (b).

Excuse for not going to trial.

It will be a good ground of excuse for not going to trial, that an order has been obtained by the defendant, and is in force, staying the proceedings. Thus the defendant cannot rule the plaintiff during the continuance of an

order staying the proceedings until security for costs be given (*Anderson v. Walsh*, 1r. R. 3 C. L. 97; *Fielden v. Donagh*, 8 Ir. C. L. R. Ap. 45); or until the costs of not proceeding to trial pursuant to notice be paid (*Read v. Shaw*, 1 Ir. L. R. 269), or until the costs of withdrawing notice of trial be paid (*Mullen v. Carroll*, 1 Leg. Rep. 243; *McCammon v. Neeson*, 2 Huds. & Br. 153). So, also, an order staying proceedings until the costs of a former action are paid (*Uniacke v. Uniacke*, Batty, 333), or until further particulars are given (*Wright v. Graves*, Batty, 331), will be a good answer to a rule under the above section. In all the cases mentioned the defendant must first vacate the order in question before attempting to proceed; and the time during which the order was in force must not only be excluded from the computation of the period above mentioned, but three consecutive terms must elapse during which the plaintiff is in default (*Anderson v. Walsh*, *McCammon v. Neeson*, *ubi supra*).

Again, where an action is brought upon a bill of exchange or other negotiable instrument, it is a sufficient answer to a rule under this section to show that the amount has been paid by one of the other parties to the instrument (*White v. Doolan*, 3 Ir. L. R. 500; *Anon.*, 6 Law Rec. 350; with which compare *Heron v. McAleer*, 1r. R. 2 C. L. 490). And if in such a case the defendant has a good defence to the action, the proper course in order to obtain his costs is to bring the case to trial by *proviso* (*Manning v. Anon.*, 10 Ir. L. R. 484).

Bankruptcy
or insolvency
of parties.

Where the plaintiff became a bankrupt or insolvent after issue joined, it was held under the repealed Act, that the defendant was not entitled to a judgment as in case of a nonsuit (*Jones v. Newbury*, Bl. D., & O. 147; *Fitton v. Evans*, 6 Ir. L. R. 466; *Cross v. Robertson*, 7 M. & G. 640); and see sect. 162, *post*. And where the defendant, after action brought, became bankrupt or insolvent, or got into insolvent circumstances, the Court would, in case an application was made to enter up a judgment as in case of a nonsuit, direct a *stet processus* to be entered; and if the defendant refused to consent to join in so doing, would either refuse the application with costs, or direct the judgment to be entered up without costs (*Crawford v. Crowther*, 8 Ir. L. R. 99; *Doe v. Mullins*, 9 Ir. L. R. 39; *O'Connor v. Evans*, 7 Ir. L. R. 210); and where the defendant had informed the plaintiff, after the commencement of the action that he intended to take the benefit of the Insolvent Act, the Court set aside the rule (*Truscott v. Latour*, 9 Ex. 420); and so, also, where the defendant had left the country after issue joined, leaving no property, and was a defaulter (*Rice v. McMahon*, 2 Leg. Rep. 135).

Where the sum sought to be recovered was only £5, and the plaintiff swore he had a good cause of action, the Court refused to allow a judgment of nonsuit to be entered up (*Anon.*, 2 Ir. L. R. 263; *McCormick v. Noblett*, 2 Jebb & Sym. 161).

Where a motion was made for a judgment as in case of a nonsuit after notice of trial had been served and withdrawn, and it appeared that the record was withdrawn at the instance of the defendant, the Court refused the application (*Clarke v. Callaghan*, 1 Ir. L. R. 354); and see *ante*, note (w), as to the effect of withdrawing notice of trial, or of the cause being made a *remanet*, or the trial proving abortive.

So, also, where it appears that the defendant in any way consents to the delay, as by negotiating for a settlement or a reference (*Hansby v. Evans*, 4 M. & W. 565), or by having applied for a postponement (*Rendell v. Bailey*, 2 Dowl. 113), he will not be entitled to a rule under this section. And

where, after an action had been brought for a malicious arrest, the defendant instituted criminal proceedings against the plaintiff on the charge for which the arrest had been made, the Court discharged a rule for judgment as in case of a nonsuit (*Gray v. Hutchins*, 3 Dowl. 414).

When a plaintiff institutes proceedings at Law and Equity for the recovery of the same demand, and elects to proceed in Equity, the defendant may rule him under the above section (*Mortimore v. Soares*, 1 E. & E. 399; *Hollier v. Eyre*, Bl., D. & O. 108).

(a) When the defendant has entered a rule that the plaintiff do proceed to trial, the plaintiff should bring the cause on for trial at the sittings or the assizes, as the case may be, next after the expiration of the notice, and should for that purpose serve notice of trial in the usual way (*Sulsh v. Cranbrook*, 1 Dowl. 148). If the plaintiff fails to comply with the rule, and has not obtained an extension of the time for proceeding, the defendant may enter a peremptory order for the payment of the costs, and the order so entered will not be rescinded unless the plaintiff accounts satisfactorily for not having proceeded to trial. In *Dowell v. Hussey*, 6 Ir. C. L. R. 230, it was laid down that nothing but a fatality can prevent the strict operation of the rule, inasmuch as the defendant, when he acts regularly, is entitled to its protection; and accordingly, in that case, the Court refused to rescind the order, the only ground of excuse shown being the laches of the clerk of the attorney. In *Colclough v. Colclough*, 14 Ir. C. L. R. 523, it was, however, held by the Court of Exchequer (*Hughes B., dissentiente*) that the Court is not precluded from looking at the circumstances under which a plaintiff withdraws a record at the assizes for which he has served notice of trial pursuant to the first of the above rules. In that case the plaintiff had withdrawn the record after the commencement of the assizes, upon discovering that a witness who was believed to have had in her possession important documentary evidence, for the production of which she had been served with a *subpoena duces tecum*, had not the evidence in question in her possession, and did not know of it; and the Court under the circumstances set aside the peremptory order for payment of costs, upon the terms of the plaintiff paying the costs of the nonsuit. So, also, if the plaintiff's failure to go to trial at the sittings or assizes in question has not arisen from any default or neglect of his own, as for instance, if it arises from the illness or act of the Judge (*Grayden v. Reardon*, 1 Ir. L. R. 355), the order will be rescinded. The plaintiff should, however, in such a case, be prompt in applying to the Court to rescind the peremptory order entered by the defendant, and should, if possible, apply to the Court to extend the time before the order in question is entered (*Colclough v. Colclough*, *ubi supra*; *Ward v. Turner*, 5 Dowl. 22). Where, however, the trial has not taken place in consequence of neglect on the part of the plaintiff or his attorney, the rule will not be rescinded (*Petrie v. Cullen*, 2 D. & L. 604; *Dowell v. Hussey*, 6 Ir. C. L. R. 230). In *Powerscourt v. Brislin*, 4 Ir. L. R. 283, the plaintiff having failed to go to trial in consequence of the absence of his counsel, the Court refused a motion for judgment as in case of a nonsuit. And see, further, note (b), *infra*, as to the grounds upon which the Court will extend the time for going to trial, and the terms which will be imposed upon the plaintiff.

Entering peremptory order.

Rescinding the order.

(aa) Where the defendant pays money into Court, he is entitled in case he obtains judgment, as in case of a nonsuit to the general costs of the cause (*McLean v. Phillips*, 18 L. J. C. P. 248).

Costs.

(b) In addition to the power above given to the Court or a Judge to ex-

tend the time for proceeding to trial, the Judge at the trial may under sect. 22 of the Common Law Procedure Act, 1856, adjourn the trial for such time as he may think fit.

Extending
time for pro-
ceeding to
trial.

The plaintiff may apply to the Court to extend the time for proceeding to trial immediately after the first of the above rules has been entered, the better course being to apply at once (*Farthing v. Castles*, 22 L. J. Q. B. 167). The Court may, however, make an order extending the time after the lapse of the twenty days (*Nosotti v. Hudson*, L. R. 3 C. P. 293, overruling *Horne v. Spencer*, 1 F. & F. 412). In order to induce the Court to extend the time, the plaintiff must satisfy the Court that his inability to proceed to trial arises, not from any wish on his part to delay the trial of the cause unnecessarily, or for the purpose of vexation, or from any other improper motive, but from necessity, or from some other just and reasonable cause. Accordingly, where a commission had been issued to examine witnesses in New South Wales, in support of the plaintiff's case, the Court extended the time for proceeding to trial to twelve months (*Druitt v. Druitt*, 2 Ir. Jur. N. S. 420). So, also, the absence of a material witness (*Montford v. Bond*, 2 Dowl. 403), or the non-production by such witness of documents which were believed to be in his possession (*Coleclough v. Coleclough*, 14 Ir. C. L. R. 523), or the absence of documentary evidence (*Greenhill v. Mitchell*, 6 Taunt. 150), may be held by the Court in the exercise of its discretion to be a sufficient excuse; and in a case where all that was sworn was, that "unexpected difficulties had arisen in procuring the necessary evidence to entitle the plaintiff to a verdict in his favour," the excuse was held to be sufficient (*Doe v. Blois*, 8 Dowl. 18). It has also been held to be a sufficient excuse that another action was pending, and about to be argued, which would decide the question in dispute (*Duke v. Tucker*, 5 Railway Cases, 116). And where a bill had been filed against a banking company, and a receiver appointed over all their property, with a reference to the Master to report on the suits to be prosecuted or defended by them, the Court would not allow a judgment as in case of a nonsuit to be entered up against them, they undertaking to go to trial forthwith (*Hughes v. Glenny*, 4 Ir. L. R. 5). The mere poverty of the plaintiff, if of a permanent nature, is no excuse (*Frodsham v. Rust*, 4 Dowl. 90); but where it appeared that the poverty was only temporary, and that he expected to be in funds within a definite period, the excuse was held to be sufficient (*Radford v. Smith*, 4 M. & W. 100). As to the bankruptcy or insolvency of the defendant, see *ante*, note (z); and as to the other grounds of excuse which may be put forward by a plaintiff, and as to obtaining a second extension of the time for proceeding to trial, see Ch. Ar., Pr. 12th ed., pp. 1505, 1508.

Terms.

In cases where the plaintiff does not apply after the entry of the first of the rules mentioned in the section for an extension of time for going to trial, and afterwards makes default, the Court will canvass much more strictly the excuse put forward by him, than if he had in the first instance made an application to extend the time (*Coleclough v. Coleclough*, 14 Ir. C. L. R. 523, 528), and an affidavit of merits may be required (*Judkins v. Atherton*, 23 L. J. Q. B. 335). The terms on which an extension of the time for going to trial will be granted are in the discretion of the Court or Judge. As a general rule, the plaintiff will be put under terms to proceed to trial within a definite period; and he may also, where the circumstances of the case render it fit—as, for instance, where he has got into insolvent circumstances, and the action is being carried on for the benefit of third parties—be ordered, as part of the terms of

rescinding the rule, to give security for costs (*Nicholson v. Milne*, 1 H. & W. 211). On the other hand, if the defendant has got into insolvent circumstances, he will be advised to consent to the entering of a *stet processus*; and if he refuse, the order will be discharged, with costs (*Holland v. Henderson*, 4 M. & W. 587; *Smith v. Badcock*, 5 Dowl. 91, and see *ante*, note (2)).

In cases where the plaintiff has already made default in proceeding to trial, the costs of not proceeding to trial, or of withdrawing the notice of trial (see *ante*, section 105), or the costs of the nonsuit in case a peremptory order has been entered, will be ordered to be paid (*Pitt v. Evans*, 2 Dowl. 266; *Colclough v. Colclough*, 14 Ir. C. L. R. 523). So, also, will the costs of the application and of entering the rule, and the payment of these costs may be made a condition precedent to proceeding further (*Colclough v. Colclough*, *ubi supra*; *Dennehaye v. Richardson*, 4 Dowl. 564). Where, however, the plaintiff has been prevented from going to trial from no fault whatever on his part, the rule may be discharged without the payment of these costs: Ch. Ar. Pr. 12th ed., p. 1510.

107. Nothing herein contained shall affect the right of a defendant to take down a cause for trial, after default by the plaintiff to proceed to trial as aforesaid; and it shall be lawful for the defendant, after such default, to proceed to have the abstract of the issues settled in the same manner as the plaintiff might have done (c).

Defendant's right to try upon default of the plaintiff, 16 & 18 Vict. c. 76, s. 116.

(c) When the plaintiff makes default in proceeding to trial, it is the Common Law right of the defendant to make up the abstract, serve notice of trial, and proceed to trial in the same manner as the plaintiff might have done; and the advantage of adopting this course, as compared with ruling the plaintiff under the preceding section, is, that while a rule under the preceding section is not conclusive between the parties, the verdict of the jury upon the trial by *proviso* is so. In the cases, moreover, which have been mentioned above (note (w), *supra*), where the defendant cannot rule the plaintiff, as, for instance, where a country cause has been made a *remanet* or a nonsuit, or verdict set aside, the defendant's only remedy is to take the cause down for trial by *proviso* (*Wright v. Hodgins*, 1 Ir. L. R. 268, *Crawford v. Huddleston*, Glasc. 125; *Williams v. Stewart*, 4 Law Rec. N. S. 171). As to when the defendant may in such a case proceed to bring the cause down for trial by *proviso*, see *McMahon v. Ellis*, 12 Ir. C. L. R. 437; *Oakley v. Ooddeen*, 11 C. B. N. S. 805. For a form of notice, see Chitty's Forms, 10th ed., p. 853; and see also *Bell v. Nangle*, 2 Jebb & S. 251.

Trial by proviso.

When defendant may serve notice.

In replevin, prohibition, and error in fact, both parties being actors, the defendant may make up the record, and proceed to trial, although the plaintiff has committed no default; and see *post*, sections 228-230.

As the defendant's right to take the cause down for trial by *proviso* is a Common Law right, the Court will not in general interfere to prevent him from exercising that right (*Whittaker v. Mason*, 6 Dowl. 429; *Pickering v. Dunne*, 1 Ir. L. T. 63). In *Marsh v. Williams*, 7 Ir. C. L. R. 99, an action was brought on a bill of exchange against an accommodation acceptor, to which the defendant pleaded infancy; and after notice of trial had been served no further proceedings were taken for more than two years. The defendant, thereupon, in order to be in a position to apply for a rule under the preceding section, and so entitle himself to the costs of the action, obtained a conditional

Will not be prevented from going to trial.

order pursuant to the 178th G. O. 1854, for liberty to proceed: the plaintiff showed cause upon the ground that the defendant had at the time of the indorsement of the bill represented himself to be of full age, and it was held notwithstanding, that the defendant was entitled to an absolute order in order that he might at all events exercise his Common Law right of taking down the record for trial by *proviso*.

Notice of trial by defendant, 15 & 16 Vict. c. 76, s. 116, Reg. Gen. H. T. 1853, r. 42.

108. When a defendant shall be entitled to go to trial as aforesaid, he may proceed without any rule or order for that purpose, and the same notice of trial shall be given as in ordinary cases, and if abstracts are entered for trial both by the plaintiff and the defendant, the defendant's abstract shall be treated as standing next in order after the plaintiff's abstract in the list of causes, and the trial of the cause may take place accordingly (d).

Where no proceedings for year and day.

Proceedings at trial.

(d) Where no proceedings have been taken in the cause after the filing of the defence for a year and a day, and no compromise is depending, the defendant must before serving notice of trial by proviso enter a rule to proceed pursuant to the 178th G. O.; otherwise his proceeding will be irregular (*Gardiner v. Gardiner*, 14 Ir. Ch. R. Ap. 31); and see *M'Mahon v. Ellis*, 12 Ir. C. L. Rep. 437. Where the plaintiff does not appear at the trial, and the issue lies upon him, the defendant should not go into his case and take a verdict, but should apply to have the plaintiff nonsuited, Ch. Ar. Pr., 12th ed. p. 1493; 2 Wms. Saunds. 336 b. If, however, he takes a verdict the Court will not set it aside except for the purpose of allowing a nonsuit to be entered (*Hodgson v. Forster*, 1 B. & C. 110).

Jury process.

Precept by Judges of Assize to summon jurors for civil as well as criminal trials, 15 & 16 Vict. c. 76, ss. 104, 106.

With respect to juries and jury process (e):

109. No jury process shall be necessary or used in any action; but the precept issued by the Judges of assize to the sheriff to summon jurors for the assizes shall direct that the jurors be summoned for the trial of all issues, whether civil or criminal (f), which may come on for trial at the assizes, and the jurors shall thereupon be summoned in like manner as at present (g).

Juries.

(e) This and the following sections provide for the summoning of juries for the trial of issues in fact. Both in town and country causes (except in the cases mentioned *infra*, note (f)) the juries are summoned pursuant to the precept of the Judge to the sheriff. If the plaintiff intends to have the cause tried by a special jury, he should give notice of his intention to the defendant at such time as it would be necessary to give notice of trial; and if the defendant intends to have a special jury, he should give the plaintiff a like notice six days before the first day of the sittings or assizes (sect. 113). The Court or a Judge may, however, at any time order the cause to be tried by a special jury (*ib.*). When either party intends to have the cause so tried, it is further necessary to give notice of such intention to the sheriff six

days before the first day of the sittings or assizes; and if such notice be not given a special jury need not be summoned or attend, and the cause may be tried by a common jury, unless otherwise ordered (sect. 115). The sheriff in every case is bound to keep a printed panel both of the common and special jurors in his office, or in the office of his returning officer, seven days before the first day of the sittings or assizes, and a copy of such panel must be annexed to the abstract (sects. 110, 111, 112). As to obtaining a jury under the old system see the next note and note (f), *infra*; and as to the qualifications of jurors and the different species of challenge, see note (g), *infra*.

(f) In *The Queen v. Rea*, 16 Ir. C. L. R. 428, it was held that the provisions of the above section do not apply to the case of a criminal information tried by a special jury struck under the old system, and that therefore the fact of such jury having been summoned by virtue of writs of *venire* and *distringas*, and not by virtue of the precept of the Judges of Assize is no ground of challenge to the array. So, also, when the jury in a civil case is struck under the old system, the provisions of the above section as to the issuing of a precept are inapplicable, and it is therefore no ground of challenge to the array that the jury has been returned and summoned without any precept issued by the Judges of Assize (*Aldborough v. Bland*, 7 Ir. C. L. R. 571). In such a case the jury should be summoned by means of the writs of *venire* and *distringas* or *habeas corpora*, as before the Act.

Jury under the old system.

(g) The sheriff is the proper officer in ordinary cases to summon the jurors; but if he be disqualified, there is nothing in the 3 & 4 Wm. 4, c. 91, or in the present Act, to deprive the coroner of his Common Law function of acting in the place of the sheriff, whether the jury to be summoned be a common or a special jury (*Aldborough v. Bland*, 7 Ir. C. L. R. 571). And where upon a writ of inquiry before the Master to assess damages the sheriff is either plaintiff or defendant, the coroner, it would appear, is the proper party to summon the jury (*Cassidy v. St. Lawrence*, 6 Ir. Jur. O. S. 315).

By whom summoned. Where sheriff disqualified.

The qualifications of jurymen, the grounds of exemption, and the manner in which the jurors' book and the panel are to be made up, is provided for by 3 & 4 Wm. 4, c. 91, amended by 8 & 9 Vict. c. 67, and 31 & 32 Vict. c. 75; and see also *Mulrahy v. The Queen*, L. R. 3 H. L. 306. When either party objects to the jury as returned by the sheriff, his course is to challenge. The challenge may be either to the array or to the polls, i. e. to the individual jurymen. A challenge to the array is an objection to all the jurors returned by the sheriff collectively, not for any defect in them, but for some partiality or default in the sheriff or his under officers who arrayed the panel, Ch. Ar. Pr., 12th ed., p. 433. A challenge to the polls is generally on the grounds either of want of qualification, or partiality. It is good ground of challenge to the array that the jurors were summoned by the plaintiff's attorney, who acted as under-sheriff, or that the name of another attorney was colourably used in place of the under-sheriff who was the real attorney, or that the jurors were summoned by the partner of the attorney of either of the parties (*Stubber v. Wall*, 1 Cr. & Dix, C. C. 54; *Chapman v. M'Gutchin*, *ib.* 121, where also the form of the challenge may be seen). A challenge to the polls may be sustained either on the ground of disqualification (*Barrett v. Long*, 7 Ir. L. R. 439, 3 H. L. Cas. 395; *O'Connell v. Mansfield*, 7 Ir. L. R. 179; 3 & 4 Wm. 4 c. 91, s. 20), or of partiality or bias. The principal grounds may be seen enumerated, Ch. Ar. Pr. 12th ed., 435, and see also *Trials per Pais*, p. 176. In *Nowlan v. The King*, 1 Huds. & Br. 164, an action having been brought to recover the amount of a defaulting county treasurer's security, a

Challenges.

Challenges to the array.

To the polls.

challenge to one of the jurors on the ground of his being a landholder of the county was held good, the grand jury of the county having at that time power under the 36 Geo. 3, c. 55, s. 55, to levy the entire amount of such defalcation off the county at large.

As to challenges to a special jury, see *post*, note (i).

When to be made.

A challenge either to the array or to the polls should not be made until a full jury has appeared. Whoever challenges first must finish all his challenges before the other begins. A challenge should be propounded in such a way that it may be at once placed upon the record, and the opposite party may then either demur or counterplead. As to the form of a challenge and counterplea, &c., see *Trials per Pais*, p. 206.

How tried.

A challenge may in general be tried in such way as the Court directs. When the challenge is what is called a principal challenge—i. e. such a one, that if it be found true, it is sufficient of itself without leaving anything to the discretion of the triers, it may be tried by the Court itself: *Ch. Ar. Pr.*, 12th ed., pp. 437, 438. When a challenge to the polls is what is called a challenge to the favour—i. e. one where it is left to the discretion of the triers to say whether the jurymen are indifferent, the challenge is tried by two jurors already sworn, or, if two have not been sworn, then by two triers appointed by the Court. If in such a case the triers try one juror, and he be found indifferent, he is sworn, and he and the two triers try the next; and when another juror is found indifferent, the two triers are superseded, and the first two jurors so sworn try the next. Although a party does not challenge, he may set aside a verdict obtained against him, if he can show that the trial was not fair and indifferent (*Baylis v. Lucas*, *Cowp.* 112).

A printed panel to be prepared and annexed to the abstract, 15 & 16 Vict. c. 76, s. 106.

110. A printed panel of the jurors summoned shall, seven days before the commission day, be made by the sheriff, and kept in the office of the returning officer in *Dublin* for inspection; and a printed copy of such panel on parchment shall be delivered by the sheriff to any party requiring the same, on payment of a fee of one shilling, and such copy shall be annexed to the abstract for *Nisi Prius*.

Sheriffs of Dublin to summon common jurors, and prepare a panel to be annexed to the abstract, 15 & 16 Vict. c. 76, s. 107.

111. The sheriffs of the County and County of the City of *Dublin* respectively shall, pursuant to a precept under the hand of a Judge of any of the said Superior Courts, and without any other authority, summon a sufficient number of common jurors for the trial of all issues in the Superior Courts of Common Law and the Consolidated *Nisi Prius* Court in like manner as before this Act; and seven days before the first day of each sittings a printed panel of the jurors so summoned for the trial of causes at such sittings shall be made by such sheriff, and kept in his office for public inspection; and a printed copy of such panel shall be delivered by the said sheriff to any party requiring the same, on payment of a fee of one shilling, and a copy on parchment shall be annexed to the abstract for *Nisi Prius*; and the said precept shall and

may be in like form as the precept issued by the Judges of Assize, and one thereof shall suffice for each Term and after sittings, and for all the Superior Courts and the said Consolidated Nisi Prius Court; and it shall be the duty of the said sheriffs respectively to apply for and procure such precept to be issued in sufficient time before each Term to enable them to summon the persons in manner aforesaid; and it shall be lawful for the several Courts or any Judge thereof at any time to issue such precept or precepts to summon jurors for disposing of the business pending in such Courts and in the Consolidated Nisi Prius Court, and to direct the time and place for which such jurors shall be summoned, and all such other matters as to such Court or Judge shall seem requisite.

112. The precept issued by the Judges of assize, and by the Judge of any of the said Superior Courts for cases in the County and City of *Dublin*, as aforesaid, shall direct the sheriff to summon a sufficient number of special jurymen to be mentioned therein, not exceeding in country cases forty-eight in all, to try the special jury causes at the assizes, or in the several Superior Courts of Common Law in *Dublin* respectively; and the persons summoned in pursuance of such precept shall be the jury for trying the special jury causes at the assizes or after sittings respectively (*h*), subject to such right of challenge as the parties are now by law entitled to in the like cases (*i*), and subject to the like liability as to the payment of the costs of obtaining such special jury (*j*); and a printed panel of the special jurors so summoned shall be made, kept, delivered, and annexed to the abstract of Nisi Prius, in like time and manner and upon the same terms as hereinbefore provided with reference to the panel of common jurors (*k*); and upon the trial the special jury shall be balloted for and called in the order in which they shall be drawn from the box, in the same manner as common jurors; provided that the Court or a Judge, in such case as they or he may think fit, may order that a special jury be struck according to the present practice, and such order shall be a sufficient warrant for striking such special jury, and making a panel thereof for the trial of the particular cause (*l*).

Special jurors summoned to try all special jury cases. 15 & 16 Vict. c. 76, s. 108.

(A) As to the manner of obtaining a special jury, see *ante*, note (*e*), and sects. 113, 115, *post*.

(i) Although doubts have been entertained, whether the array in special jury causes can be challenged (*R. v. Johnson*, 2 Str. 1000; *R. v. Burridge*, 1 Str. 593), yet it would appear that such a right does exist (*Aldborough v.*

Challenges to special jury.

Bland, 7 Ir. C. L. R. 571). The right of challenging an individual special jurymen undoubtedly existed previous to the passing of 3 & 4 Wm. 4, c. 91, and was recognised by the 17 & 18 Geo. 3, c. 45, s. 9; and notwithstanding that sect. 20 of 3 & 4 Wm. 4, c. 91, is restricted to the case of a common jurymen, the right still exists (*Barrett v. Long*, 3 H. L. Cas. 395; *O'Connell v. Mansfield*, 9 Ir. L. R. 179).

Costs of special jury.

(j) By sect. 27 of 3 & 4 Wm. 4, c. 91, it is provided that the person or party who shall apply for a special jury shall pay the fees for striking such jury, and all the expenses occasioned by the trial of the cause by the same, and shall not have any further or other allowance for the same upon taxation of costs than such person or party would be entitled unto in case the cause had been tried by a common jury, unless the Judge before whom the cause is tried shall immediately after the trial certify under his hand upon the back of the record that the same was a cause proper to be tried by a special jury. Accordingly, the rule being, that the party applying for a special jury has to pay the costs of obtaining same, unless the Judge certifies that the cause was a proper one to be tried by a special jury, it has been held that even in cases where the plaintiff obtains a verdict, but is entitled to no costs under sects. 126 and 243 of the present Act, the defendant, if he obtains a special jury, must pay the costs of same unless the Judge gives the prescribed certificate (*M'Govern v. M'Namara*, 12 Ir. C. L. R. Ap. 15; *Kerr v. Midland Great Western Railway Co.*, 10 Ir. C. L. R. Ap. 45; *Martin v. Cochrane*, 5 Ir. L. R. 374). When a defendant obtained an order for a special jury, which had been struck accordingly, and the plaintiff afterwards entered a rule to discontinue, it was held that the plaintiff could not by so doing deprive the defendant of the opportunity of getting a verdict, and a certificate entitling him to his costs (*Johnson v. Midland Railway Co.*, 3 Ir. C. L. R. 251); and see *Clements v. George*, 11 Moore, 510. When a special jury case is referred at Nisi Prius, and the consent contains no provision for the costs of the special jury, no allowance can be made for them, unless the consent provides otherwise (*Labertouche v. Murray*, 2 Huds. & Br. 541; *Porter v. Murray*, 3 Law Rec. O. S. 157). Where the verdict for the plaintiff was set aside and a second verdict was obtained by the plaintiff from a common jury, the defendant was ordered to pay for the special jury obtained by him on the occasion of the first trial, and not certified for by the Judge (*Harrison v. Bradley*, 3 Ir. L. R. 267). When the jury finds for the plaintiff on some of the issues, and for the defendant on others, the party who becomes entitled to the general costs of the cause will, in case he be the party who has obtained the special jury, be entitled to the costs of same, if the Judge certifies (*Waters v. Howells*, 8 Ex. 244; *Blain v. Wilson*, 3 Ir. L. R. 134). The Crown stands in the same position, as regards the costs of a special jury, as an ordinary plaintiff or defendant, and the person, therefore who applies on its behalf for a special jury is bound to pay the expenses of same where the Judge refuses to give a certificate (*Attorney-General v. The Primate*, 2 Jones, 362). The Judge should certify "immediately after the verdict," i. e. within a reasonable time after it is pronounced (*Christie v. Richardson*, 2 Dowl. N. S. 503). In *Johnson v. West of England Assurance Co.*, 2 Ir. Jur. O. S. 291, the certificate was given the day after the verdict; but where the Judge's signature to a certificate, which he in Court intimated his intention of giving, was not procured for some weeks after the trial, it was held that he had not certified in time (*Grace v. Church*, 3 G. & D. 591); and see *Serrell v. Derbyshire Railway Co.*, 10 C. B. 910; *Leech v. Lamb*, 11 Ex.

When certificate to be given.

437. As to the costs of a special jury, where an issue is sent for trial from the Landed Estates Court, or Court of Chancery, see *Bodkin v. Leahy*, 3 Ir. C. L. R. 36. In that case an issue was framed pursuant to 8 & 9 Vict. c. 109; and although no certificate was indorsed upon the record, the plaintiff (who had obtained a special jury, and succeeded in the case) was held to be entitled to the costs.

It is not possible to lay down any general rule as to what is a fit case to be tried by a special jury. If the case turns solely on a question of law, and there is no question of fact in dispute between the parties, a certificate will not be given (*Wemyss v. Greenwood*, 2 Car. & P. 483).

(k) The special jurors need not, however, be summoned, unless notice be given as provided by sect. 115 of the Act.

(l) According to the practice prevailing at the passing of the present Act, and which was regulated by sect. 25 of 3 & 4 Wm. 4, c. 91, whenever an order was obtained for a special jury, the sheriff attended before the officer of the Court with the jurors' book and special jurors' list, and the officer thereupon selected by ballot forty-eight names from the special jurors' list; and, if necessary, from the jurors' book. Either party might show during the balloting that any of the jurors drawn was incapacitated, and another juror was then chosen in his place. When forty-eight names had been selected in this manner, a list of the jurors chosen was made out by the officer for both parties; and the list so made out was afterwards reduced, i. e. either party might strike out twelve names and twenty-four remaining jurors thereupon became the jury for the trial of the cause.

Special Jury under the old system.

As to the manner in which, when a special jury under the old system is struck, the jurors are to be summoned, see *ante*, p 123, note (f).

The granting of an application that a special jury may be struck according to the old system is in the discretion of the Court, and depends upon the peculiar facts and circumstances of each case (*Magee v. Mark*, 5 Ir. Jur. N. S. 131). As a general rule, the application will be granted in those cases only where the circumstances raise a reasonable presumption that an impartial jury cannot be obtained under the present practice (*Weir v. Weir*, 6 Ir. Jur. O. S. 143), and it will not be granted merely upon grounds which would likewise apply to the majority of cases (*Hirsch v. The Beet Sugar Co.*, 6 Ir. Jur. O. S. 291; *Belfast Water Co. v. Girdwood*, 1 Ir. L. T. 661). The fact of the plaintiff and defendant being of different religions, or entertaining different political opinions, is not sufficient *per se* to induce the Court to order a jury to be struck under the old system, even in cases where strong prejudices may possibly operate (*Smyly v. Hughes*, 7 Ir. Jur. O. S. 139; *Shirley v. Hughes*, 16 Ir. C. L. R. Ap. 8; *Magee v. Mark*, 5 Ir. Jur. N. S. 131; *Somers v. Reilly*, 6 Ir. Jur. N. S. 295, *sed vide* *McLester v. Fegan*, 9 Ir. C. L. R. Ap. 43). Neither will it in general be sufficient ground for granting the application, that the applicant is a stranger, and unknown to the body of the jurors, while the other party is well known to them, and possessed of influence (*Harrison v. Lynch*, 3 Ir. C. L. R. 259; *Codd v. Thompson*, 5 Ir. Jur. N. S. 105); but where the venue was laid in the county of a city in which the number of jurors was limited, the Court permitted a jury to be struck under the old system, an affidavit showing that the plaintiff was possessed of considerable influence in the place where the venue was laid, and that several of his relatives would be most likely be upon the panel (*Barron v. West of England Assurance Co.*, 3 Ir. C. L. R. 112).

When a jury will be so struck.

How application made.

It has been held that notice of an application to strike a jury under the old

system must be served upon the opposite party (*Magee v. Mark*, 5 Ir. Jur. N. S. 131; *Grome v. Blake*, 8 Ir. C. L. R. Ap. 68), although in the earlier cases; *Fleming v. Taylor*, 8 Ir. C. L. R. 75, *Dickson v. Denroche*, 3 Ir. C. L. R. 241, it was held that the application may be made *ex parte*.

Mode of obtaining a special jury. 15 & 16 Vict. c. 76, s. 109.

113. The plaintiff in any action, except for the replevin of goods, shall be entitled to have the cause tried by a special jury, upon giving notice in writing to the defendant at such time as would be necessary for a notice of trial of his intention that the cause shall be so tried, and the plaintiff in an action for the replevin of goods, and the defendant in other cases, shall be so entitled, on giving the like notice, within six days before the first day of the assizes or after sittings respectively (m); provided that the Court or a Judge may at any time order that a cause shall be tried by a special jury, upon such terms as they or he shall think fit (n).

Where cause tried twice.

(m) Under the old practice, when an order had been obtained for a special jury, and the cause had been accordingly tried, if the cause came on for trial a second time, either in consequence of the first jury having disagreed or their verdict having been set aside, the second trial might be had before a common jury although the order for the special jury had not been discharged (*Dowdall v. Kelly*, 6 Ir. Jur. O. S. 303; *Walsh v. Whitty*, 12 Ir. L. R. 216, *Bell v. Nangle*, 2 Ir. L. R. 296); and accordingly, if plaintiff or defendant wishes a cause which comes on for trial a second time to be tried by a special jury, he should take care to serve notice in the manner pointed out above of his intention to have the cause so tried.

When short notice of trial is served.

The plaintiff (except in replevin) must, in general, as will be seen above, give notice of his intention to have a special jury ten days before the trial, while the plaintiff in replevin and the defendant in other causes, must give a similar notice six days before the trial. Where, however, short notice of trial is given, the plaintiff may give the notice at the same time as he serves notice of trial; but, inasmuch as the defendant in such a case cannot give six days' notice to the plaintiff, it would follow that he will have to obtain an order of the Court in order to have the cause tried by a special jury. Upon the literal construction of the above section it would also follow that a defendant in replevin could not serve notice of his intention to have a special jury; however, having regard to the provisions of the next section, it seems that he may do so, and that it is not necessary for him to obtain an order from the Court for the purpose.

Applying to the Court.

(n) When the time for serving notice has elapsed, leave will be readily granted to have the cause tried by a special jury on showing any fair reason why the cause should be so tried (*Cooper v. Owen*, 8 Ir. C. L. R. Ap. 20, *Scanlan v. McCarthy*, 5 Ir. Jur. N. S. 199). The party applying may, however, be ordered to pay the costs of the motion (*Spong v. Fahy*, 5 Ir. C. L. R. 353).

Remedy for delay by notice of special jury. 15 & 16 Vict. c. 76, s. 111.

114. Where the defendant in any case, or plaintiff in an action for the replevin of goods, gives notice of his intention to try the cause by a special jury, the Court or a Judge, if satisfied that such notice is given for the purpose of delay,

may order that the cause be tried by a common jury, or make such other order as to the trial of the cause as such Court or Judge shall think fit (o).

(o) Previous to the passing of the Act, a rule for a special jury was frequently obtained by a defendant for the purpose of embarrassing and delaying the plaintiff. Under the above section, however, the Court or a Judge may order the cause to be tried by a common jury, when it appears that the intention of the defendant in obtaining a special jury was for the purpose of delay. The application should be supported by affidavit (*Dunn v. Cox*, 16 M. & W. 439, *per* Pollock, C. B.).

115. Where notice has been given to try by special jury, either party may, six days before the first day of the sittings in *Dublin*, or commission day of the assizes, give notice to the sheriff that such action is to be tried by a special jury; and in case no such notice be given, or the notice has not been given in sufficient time, no special jury need be summoned or attend, and the cause may be tried by a common jury, unless otherwise ordered by the Court or a Judge (p).

Notice to sheriff of trial by special jury. 16 & 16 Vict. c. 76, ss. 112, 113.

(p) Where there is reason to apprehend that there are no other special jury cases for trial at the assizes, and in consequence of short notice of trial having been given, or from other causes, it has not been possible to give the requisite six-day notice to the sheriff, the parties must obtain an order from the Court in order to insure a special jury for the trial of the cause.

116. A writ or clause of view shall not be necessary or used, but whether the view is to be had by a common or special jury it shall be sufficient to obtain a rule of the Court or a Judge's order directing a view to be had, and directing the sheriff to have six or more of the jurors named in the panel chosen by consent, or, if the parties cannot agree, nominated by the proper officer of the Court at the place in question some convenient time before the trial; and the viewers shall have the place shown to them by two persons to be named in the order, and to be appointed by the Court or a Judge; and the sheriff, upon request, shall deliver to either party the names of the viewers, and shall also return their names to the registrar, for the purpose of their being called as jurymen upon the trial (q).

View to be by rule. 16 & 16 Vict. c. 76, s. 114.

(q) The first Statute enabling the parties in an action to have a view jury was the 4th Anne, c. 16, s. 8 (Eng.), 6th Anne, c. 10, s. 8 (Ir.) under which the Court was empowered to order special writs of *distringas* or *habeas corpora* to issue, by which the sheriff was commanded to have six out of the first twelve jurors named in the writs, or some greater number of them, at the place in question some convenient time before the trial, who then and there

View jury.

should have the matter in question shown to them by two persons named in the writs.

The section in question was repealed by 3 & 4 Wm. 4, c. 91, s. 50; but by sect. 16 of that Act, provision was made in almost similar terms, enabling the Court to issue a writ of view; and by sect. 17 it was further provided, that where a view should be allowed in any case, those men who should have had the view, or such of them as should appear upon the jury to try the issue, or such of them as should not be challenged off, should be first sworn. These sections have not been repealed, except, in so far as they are affected by the above enactment. The Court cannot, even by consent, order a view in one county by a sheriff of another; nor can it compel a jury to go out of the limits of the county for such a purpose (*Mulins v. Lord Dunraven*, 9 Jur. 690). In general a view jury can only be applied for in actions of a local nature, as, for instance, trespass, or the like (*Stones v. Menhem*, 2 Ex. 382, per Parke, B.); and accordingly in that case an order was refused, the action having been brought by a bricklayer for work and labour. So, also, a similar application has been refused in an action of covenant for dilapidations (*Brown v. Redmond*, 4 Ir. Jur. O. S. 252).

When granted.

Form of application.

In all the Courts the application for a view jury must be upon notice (*Irwin v. Lattimer*, 8 Ir. C. L. R. Ap. 71). In *Loughnan v. Dempsey*, 6 Ir. Jur. N. S. 86, it appears to have been laid down that it is not necessary to state in the affidavit in support of the application the exact grounds of the necessity for a view. The order to be drawn up should state precisely the names of the viewers and of the showers, and the time and place of meeting (*Taylor v. Thompson*, 7 Bing. 403; *Stones v. Menhem*, 2 Ex. 382). The attorneys in the cause may be made the showers.

See further, as to the inspection or examination by the parties or by the jury of premises or chattels in the possession or power of either party, *ante*, p. 44, sect. 47.

Proceedings before jurors so returned same as before this Act. 15 & 16 Vict. c. 76, s. 115.

117. The jurors whose names are contained in such panel as aforesaid shall be the jurors to try the causes at the assizes and sittings for which they shall be summoned respectively; and all such proceedings may be had and taken before such juries in like manner and with the like consequences in all respects as before or in respect of any jury summoned in pursuance of any writ or writs of Venire facias juratores, Distringas juratores, or Habeas corpora juratorum (*r*), before this Act, and also in respect of persons summoned to appear upon such juries, and in the event of an insufficient attendance of persons summoned and competent to act as jurors (*s*).

(*r*) When the jury is struck under the old system, there is no necessity for a precept from the Judge for summoning the jurors, and in such a case the jury should be summoned by the same writs as before the Act: *ante*, p. 123, note (*f*).

Tales.

(*s*) Sect. 28 of 3 & 4 Wm. 4, c. 91, provides that in any suit or action, the Court shall, at the request of the parties, command the sheriff, as need shall require, to name and appoint twelve other able men of the County, &c.,

then present, to serve on the jury, and the names so returned are to be bal-
loted for in the same way as the ordinary panel. When a *talesman* has
been sworn upon the jury, and it is alleged by the record that he was duly
elected, tried, and sworn, no proceeding in error will lie, because it does not
appear that he was empanelled and sworn pursuant to 3 & 4 Wm. 4, c. 91,
s. 28 (*Strong v. Keen*, 13 Ir. L. R. 93).

In criminal cases if by any fatality, or by any other circumstance, as, for
instance, by the imperfect discharge of the sheriff's duty or otherwise, the
panel becomes exhausted or inoperative, the Judge may order the sheriff by
a verbal order to return a jury immediately where issue is joined between
the Crown and a prisoner (*Regina v. O'Neill*, 4 Ir. C. L. R. 221).

With respect to matters of evidence and the admission of
documents, be it enacted as follows:

Evidence.

118. Either party may call on the other party, by notice
(*t*), to admit any document, or a copy thereof (*u*), saving all
just exceptions (*v*); and in case of refusal or neglect to admit
within a reasonable time, the costs of proving the document
or copy shall be paid by the party so neglecting or refusing,
whatever the result of the cause may be, unless at the trial
the Judge shall certify that the refusal to admit was reason-
able (*w*); and no costs of proving any document or copy shall
be allowed unless such notice be given, except in cases where
the omission to give the notice is, in the opinion of the tax-
ing officer, a saving of expense (*x*).

Admission of
documents
15 & 16 Vict.
c. 76, s. 117.

(*t*) The form of a notice to admit is prescribed by the General Order,
1854. The notice calls upon the party to admit that such of the documents
as are originals were written, signed, or executed as they purport to have
been; that such as are copies are true copies; and that such as are stated to
have been served, sent, or delivered, were so served, sent, or delivered, saving
all just exceptions to the admissibility of the documents as evidence. The notice
should be served a reasonable time, before the trial, in order to give the per-
son served an opportunity of going to inspect the document; and if not
served within a reasonable time it would be a good ground for the Judge
certifying that the refusal to admit was reasonable. See Gray on Costs, p.
362; *Tynn v. Billingsley*, 3 Dowl. 810. If the notice calls on the opposite
party to admit more than is provided for by the Statute, he may reject it *in*
toto (*Oxford, &c., Railway Co. v. Scudamore*, 1 H. & N. 666, referred to *in*
fra); but each admission sought is to be treated as a separate part of the
notice, *Id*. The notice should not be more voluminous than is necessary,
otherwise the costs of it will be disallowed (*Edwards v. South-Western Rail-
way Co.*, 12 C. B. 419).

Form of
notice.

(*u*) The object of calling on the opposite party to admit a document is to
save the expense of proving it in the regular way; and accordingly a party
proving a document will not, in default of serving such a notice, be entitled to
the costs of proving the document, unless the omission to give the notice is a
saving of expense; and on the other hand, if the opposite party does not on
being served with the notice admit the document, he will have to pay the
costs of proving it, no matter what the event may be, unless the Judge cer-
tifies that the refusal to admit was reasonable.

Object of
notice.

What documents within the Statute.

The enactment applies to every species of document, even though the document in question is not in the possession of either of the parties, or within their control, or in an inaccessible place (*Rutter v. Chapman*, 8 M. & W. 391); or even though the validity of the document is put in issue by the pleadings (*Spencer v. Burough*, 9 M. & W. 425). Where the issue in an action was whether the petition for a charter was the petition of the householders of a borough, and the defendant had witnesses in attendance at the trial to prove the genuineness of their signature, it was held that he was not entitled to the costs of such witnesses in default of having served a notice to admit (*Rutter v. Chapman*, 8 M. & W. 388). And the words of the section are wide enough, it would appear, to include a foreign judgment (*Smith v. Bird*, 3 Dowl. 641, 645).

Admission of copies.

As regards the effect of a notice served under this section, a distinction must be drawn between those cases where the party is called on to admit a copy, and where he is called on to admit an original. Where the notice calls on the opposite party to admit a copy, and the notice is not complied with, and the original is afterwards proved, the party serving the notice will not be entitled to the costs of proof (*Rochfort v. Sedley*, 12 Ir. C. L. R. Ap. 4); and where the party served with a notice calling on him to admit a copy complies with the notice, and admits that the copy is a true copy, such an admission does not preclude the necessity of proving the existence and genuineness of the original (*Sharpe v. Lamb*, 11 A. & E. 805; *Rochfort v. Sedley*, *ubi supra*). So, also, in the case of an action upon a bill of exchange, the mere admission of the signature will not preclude the defendant from objecting at the trial to the bill not being duly stamped (*Vane v. Whittington*, 2 Dowl. N. S. 757).

Effect of admission.

Where the notice called upon the defendants to admit a bill "drawn by the plaintiff upon and directed to the defendants as A. and Co., and accepted by B. for the defendants as A. and Co.," it was held that the admission precluded the defendants from denying B.'s authority (*Wilkes v. Hopkins*, 1 C. B. 737).

Where the defendant was called upon to admit a letter which was described in the notice as relating to a field "then in the possession of the plaintiff," it was held that an admission of the letter did not involve an admission that the field was then actually in the possession of the plaintiff (*Pi'grim v. The Southampton Railway Co.*, 18 L. J. C. P. 330). If a document is admitted, it is not necessary to account for an erasure or interlineation, unless such erasure or interlineation appears to have been made after the admission (*Poole v. Palmer*, Car. & M. 69, *Freeman v. Stiggel*; 14 Q. B. 202). And where a document was described in the notice to admit as a counterpart of a lease, and was admitted, but was in fact a lease with only a counterpart stamp, the party was held bound by his admission (*Doe v. Smith*, 3 N. & P. 335).

An admission of original letters in the ordinary form as in the handwriting of the party admitting precludes an objection to the authenticity of any part, even an addition to a postscript obviously in a different handwriting (*Hawk v. Freund*, 1 F. & F. 294); the admission will not, however, preclude the party from objecting that the document does not affect him (*Wills v. London Gas Light Co.*, 1 F. & F. 346).

Extent of admission to which party is entitled.

The only thing which a party has a right to call on the opposite party to admit under this section is the document or copy in question, so as to identify

it in the cause (*Rutter v. Chapman*, 8 M. & W. 394, per *Rolfe*, B.); and if the notice goes beyond what the Statute authorizes, the party has a right to reject the whole. Thus, where a notice called upon the defendant to admit the authority by which the documents were written, and no answer was given to the notice, and a verdict had for the defendant, it was held that the plaintiff, who proved the documents in question at the trial, had no right under the above section to the costs of such proof (*Oxford &c., Railway Co. v. Scudamore*, 1 H. & N. 666). The defendant may, of course, notwithstanding, by answering the notice, admit the matters which he should not have been called upon to admit.

It is in no case compulsory on a party intending to produce evidence to call on the opposite party to admit them; and it will often be more prudent not to serve such a notice, as the only consequence of not serving it is that the party neglecting to serve it may be unable to recover the costs of proof. In no case should a party be satisfied with any admission which is not a formal one (*Holford v. Hughes*, 10 W. R. 60). If, however, a plaintiff be nonsuited in consequence of a refusal by the defendant at the trial to admit certain documents which had been agreed to be admitted by the defendant or his attorney or agent, the Court will grant a new trial, with costs to be paid by the defendant (*Doe v. Roe*, 5 Dowl. 420).

Form of admission.

If a party inadvertently makes an admission, which he is anxious to withdraw, he should obtain an order of the Court for the purpose which may be allowed under special circumstances (*Elton v. Larkins*, 5 Car. & P. 385). It is not sufficient merely to give notice of withdrawal (*Doe v. Bird*, 7 Car. & P. 6), and an admission once made will hold good for any subsequent trial of the cause (*Elton v. Larkins*, *ubi supra*). In every case it will be observed that the party called upon to admit need only admit, "saving all just exceptions," as to which see next note

Inadvertent admission.

(v) Where the party admits the handwriting to a bill, he will not be precluded from objecting to the instrument on the ground of its not being stamped (*Vane v. Whittington*, 2 Dowl. N. S. 757, with which compare *Doe v. Smith*, 3 N. & P. 335; and so, also, as mentioned above, the admission of the signature will not dispense with the production of the original (*Vane v. Whittington*, *Sharpe v. Lamb*, *ubi supra*).

"Just exceptions."

(w) As a general rule, it would be considered reasonable to refuse to admit a private document, to which the party is in no way privy, and of which he cannot have inspection (*Rutter v. Chapman*, 8 M. & W. 392, per *Parke*, B.). If the jury disagree at the trial, or the trial prove otherwise abortive, it would seem that the party serving the notice cannot, in case it is not complied with, recover the costs of proving the documents pending the action (*Rochfort v. Sedley*, 12 Ir. C. L. R. Ap. 4; *Doe v. Davies*, 12 A. & E. 21). The party refusing to admit will not be liable to the costs where the proof is not satisfactory (*Day v. Vinson*, 32 L. J. Ex. 171; *Doe v. Peters*, 1 Car. & K. 279; *Freeman v. Rosher*, 6 D. & L. 517), or the document not admissible (*Phillips v. Harris*, 1 Car. & M. 492).

When a party may refuse to admit.

(x) If a witness is called for the purpose of proving something else besides the genuineness of the document in question, his expenses will be allowed, although no notice to admit has been served (*Storv v. Houlditch*, 1 Sc. N. R. 206); and the expenses of a witness called to translate and explain ancient records of a public nature, and to watch and explain the records produced by the opposite party, and the expense of searching for and obtaining

Where witness called to prove other matters.

copies and translations of such records to be used in evidence will be allowed on taxation between party and party, though the opposite party has not been called upon to admit them (*Bastard v. Smith*, 10 A. & E. 213).

Proof of admissions, 15 & 16 Vict. c. 76, s. 118.

119. An affidavit of the attorney in the cause, or his clerk, of the due signature of any admissions, made in pursuance of such notice, and annexed to the affidavit, shall be in all cases sufficient evidence of such admissions (y).

(y) As to the affidavit, see sect. 44 of 13 & 14 Vict. c. 18 (Process and Practice Act), *post*, in the Appendix.

Proof of notice to produce, 15 & 16 Vict. c. 76, s. 119.

120. An affidavit of the attorney in the cause, or his clerk, of the service of any notice to produce, in respect of which notice to admit shall have been given, and of the time when it was served, with a copy of such notice annexed to such affidavit, shall be sufficient evidence of the service of the original of such notice, and of the time when it was served (z).

By whom the notice is to be served.

(z) The object of this section is to dispense with the necessity of strict proof of service of a notice to produce, and so relieve the parties from what was in general an unnecessary expense. It will be observed, however, that in order to entitle a party to the benefit of the section, a notice to admit must have been served, and no provision is made as to the proof of service of the latter notice. It would, therefore, appear that the service of the notice to admit must be proved in the regular way. The object of serving a notice to produce, is to enable the party to give secondary evidence in case the document is not produced. If the document is in the possession of a third party, a *subpoena duces tecum* must be served upon him. A notice to produce may be served, not only when the document is in the possession of the opposite party, but also when it is in the possession of some one on his behalf, as for instance, the captain of his ship (*Baldrey v. Ritchie*, Stark, 338), or his banker (*Partreda v. Coates*, R. & M. 156). The possession of one surety is not the possession of the other (*Robinson v. Browne*, 3 C. B. 754); nor will secondary evidence of a document to produce which notice has been given be admissible where the document is held by a stakeholder between the party in the cause and a third person (*Parry v. May*, 1 M. & Rob. 279). As a general rule, when a document is in the possession of the opposite party, secondary evidence of its contents is not admissible, unless a notice to produce has been served—*Roscoe on Evidence*, 12th ed., p. 8, where also the exceptions to the rule will be found stated. A notice to produce is not, in general, necessary in the case of a mere notice, which can be proved by a copy (*Colling v. Treweek*, 6 B. & C. 394, 398); and therefore a notice to produce a notice to quit, and notice of dishonour, may be proved by a copy without production of the original notice. Where, however, the issue was whether notice of default by a principal had been served upon a surety, it was held, that the original notice should be produced, or its absence accounted for (*Robinson v. Browne*, 3 C. B. 754). A notice to produce is not necessary, where, from the nature of the proceedings, the party in possession of the document has notice that he is charged with the possession of it, as, for instance,

When not necessary

in an action of trover for a bond (*How v. Hall*, 14 East, 274), or for the certificate of a ship's registry (*Bucher v. Jarratt*, 3 B. & P. 143).

The notice itself should be in writing and properly entitled, although, strictly speaking, a verbal notice is sufficient, (see *Smith v. Young*, 1 Camp. 440). It should specify the document sufficiently for the information of the party to whom it is addressed. In *Ahern v. Maguire*, Arm., Mac., & Og., 39, it was held by *Brady*, C. B., that a notice to produce "the several letters written in the year 1839," was too general. On the other hand, a notice to produce "all and every the letters written by the plaintiff to the defendant, and relating to the matters in dispute in the action," was held to be sufficient in *Jacob v. Lees*, 2 M. & Rob. 33. A notice to produce a letter purporting to enclose an account is a sufficient notice to produce the account (*Engall v. Druce*, 9 W. R. 536).

Form of notice

The notice may be served either on the opposite attorney, or on the opposite party himself (*Hughes v. Budd*, 8 Dowl. 315). It should be served a reasonable time before the trial, so as to enable the party to search for and obtain the document called for; and the question of what is a reasonable time is one entirely for the Judge. It would in general be too late to serve it on the day of trial, or the preceding evening, especially in a country cause (*Jones v. Curry*, 8 Ir. L. R. 257; *Newton v. O'Grady*, Arm., Mac., & Og., 228), although, if the document be in Court at the time of service, a notice to produce it served while the trial is proceeding will be sufficient (*Dwyer v. Collins*, 7 Ex. 639). It should not be served upon a Sunday (see *Hughes v. Budd*, 8 Dowl. 317). The notice to produce will apply not merely to the first, but to the succeeding trials (if there be such) as well (*Hope v. Beadon*, 2 L., M., & P., 593); and a notice served for the hearing of a civil bill will apply to the hearing of the appeal as well (*Clarkson v. Plunkett*, Ir. Cir. Rep. 430; *McDonnell v. Conry*, *ib.* 807).

When to be served.

The document cannot be called for until the party calling for it has entered upon his case (*Graham v. Dyser*, 2 Stark, 22); when produced it must be proved in the regular way (*Wetherston v. Edgington*, 2 Camp. 94); if it be not produced, the party called on to produce may give evidence to disprove possession; and secondary evidence will not be admissible, unless possession be brought home to the party, or some one on his behalf (*Harvey v. Mitchell*, 2 M. & Rob. 366). If a party refuses to produce, and secondary evidence is gone into, the party refusing cannot afterwards produce the document in support of his own case (*Doe v. Hodgson*, 2 M. & Rob. 283; *Collins v. Gashon*, 2 F. & F. 47). If the document produced is denied to be the document called for, the Judge will have to determine whether it is so or not before admitting secondary evidence (*Boyle v. Wiseman*, 11 Ex. 360; *Froude v. Hobbs*, 1 F. & F. 612).

How document proved.

With respect to bills of exception, be it enacted as follows:

121. Every bill of exceptions may be according to the Form No. 6 in the Schedule B. to this Act annexed; and it shall be lawful, by consent of the parties, or order of the Judge, to incorporate any deed or document therewith, by an appropriate reference to such deed or document, without setting forth the same (a).

Bills of Exceptions.

Bill of Exceptions not to set forth the pleadings

(a) If the Judge at the trial makes an erroneous ruling, or directs the jury improperly, the party dissatisfied may require him to sign a bill of exceptions.

Bills of Exceptions.

Origin of right.

of exceptions, for the purpose of having the ruling or direction complained of reviewed by the Court above. The right of the party who is dissatisfied to have a bill of exceptions is founded on the Statute of Westminster, 2, c. 31, by which it is enacted, that "When one that is impleaded before any of the justices doth allege an exception, praying that the Justices will allow it, which if they will not allow it, if he that alleged the exception do write the same exception, and require that the Justices will put their seals for a witness, the Justices shall do so; and if one will not, another of the company shall. And if the King, upon complaint made of the Justices, cause the record to come before him, and the same exception be not found in the roll, and the plaintiff show the exception written with the seal of a Justice put to, the Justice shall be commanded that he appear at a certain day, either to confess or deny his seal. And if the justice cannot deny his seal, they shall proceed to judgment according to the same exception as it ought to be allowed or disallowed."

English practice.

According to the practice prevailing in England, the exceptions are not treated as incorporated in the *postea*, and are not dealt with in the Court in which the cause is pending. The party who excepts is accordingly obliged to take proceedings in error, and have the matter determined in a Court of Error. By the Irish Act, 28 Geo. 3, c. 31, s. 1, however, it is enacted, "that it shall be sufficient if the Judge to whom such bill of exceptions shall be tendered to sign the same, and that it shall not be necessary for him to put his seal thereto, and that such bill of exceptions so signed shall remain with the clerk of *Nisi Prius*, and be incorporated in the *postea*, and be returned therewith to the Court in which the action is brought, which Court shall have authority to examine the same, and give judgment thereon, or make such order, either by arresting the judgment, granting a *venire facias de novo*, or otherwise as shall be agreeable to justice."

Where examinable.

Accordingly in this country the exceptions are treated as incorporated with the *postea*, and the party excepting is enabled to have the exceptions examined in the Court in which the action is brought before judgment is pronounced, in place of being obliged to remove them into a Court of Error, after the Court below has pronounced judgment. See further as to the construction of the Act, *infra*.

In what cases right exists.

The right of a party to except only exists in civil cases. Accordingly exceptions cannot be taken at the trial of an information for libel (*Rex v. M'Donnell*, 1 Huds. & Br. 439); nor in an information for penalties (*Attorney-General v. Radloff*, 23 L. J. Ex. 240). By 22 & 23 Vict. c. 21, s. 29 (English), a bill of exceptions may be tendered at the trial of any issue arising on the revenue side of the Court of Exchequer. This provision has not, however, been extended to Ireland, see 24 & 25 Vict. c. 92, s. 2. A bill of exceptions cannot be tendered upon the trial of an issue directed by the Court of Chancery (*Clayton v. Nugent*, 8 Jur. 867).

For what an exception lies.

As before mentioned, an exception may be taken for an erroneous ruling or direction of the Judge. The mistake must, however, be upon some point of law, either in admitting or refusing evidence, or the like. Where the venue is local, an objection founded on a misdescription of the venue cannot be taken by a bill of exceptions at the trial, if the misdescription appears upon the face of the pleadings, inasmuch as such an objection should have been taken by demurrer (*M'Mahon v. Leqnard*, 4 Ir. C. L. R. 16, with which compare *Heywood v. Reynolds*, 6 Ir. L. R. 1). In *Aldborough v. Bland*, 7 Ir. C. L. R. 571, it was questioned whether the overruling of a challenge to

the array can be made the subject matter of an exception: see, however, the note to *Millar v. Warre*, 1 Car. & P. 239. The fact that a Judge has allowed a leading question to be put, is not the subject of an exception (*Lawder v. Lawder*, 5 Ir. C. L. R. 27). Neither is the refusal of the Judge to direct the jury in a particular manner, the ground of an exception as it is for a *misdirection* and not a *nondirection* that a bill can be tendered, and the bill of exceptions should therefore state what the Judge has told the jury, and not what he has refused to tell them (*Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *Sedley v. M'Gowan*, 7 Ir. C. L. R. 427). A refusal to nonsuit is not, for the same reason, a ground of exception (*Sedley v. M'Gowan*, *ubi supra*). Although nonsuiting a plaintiff against his will is (*Corsar v. Corsar*, 21 L. J. Q. B. 18).

Does not lie for nondirection.

Where the probate of a will was produced to prove a bequest of a term of years, and the Judge, in place of directing a verdict, left the question to the jury; it was held that a bill of exceptions would not lie (*Chichester v. Phillips*, T. Raym, 405). In such a case the party should have demurred to the evidence. So, also, no exception lies for refusing to direct the jury on a matter of fact (*Malcolmson v. Morton*, 11 Ir. L. R., 230); and where the Judge left it to the jury to say whether a document purporting to be signed by both parties was a complete agreement between them or merely signed as instructions for preparing an agreement, it was held that an exception would not lie (*Greenham v. Gray*, 3 Ir. Jur. N. S. 9).

On a bill of exceptions the case must always have gone to the jury (*Millar v. Warre* 1 Car. & P. 239; see *vide* *Corsar v. Reed*, 21 L. J. Q. B. 18).

Where an objection exists either to the charge of the Judge, or the reception of evidence, or as to any other matter, the objection should be taken at the time (*Ball v. Mannin*, 3 Bligh, N. S. 22, Sm. & Batty, 454, 462; *The Queen v. O'Connell*, 7 Ir. L. R. 261, 332). Thus, where a party is dissatisfied with the Judge's charge, he should, at its close, state his objections; and it is not sufficient to state a general dissent, but the question sought to be left to the jury should be specifically stated, and the Judge should be requested to leave the matter to the jury in the manner required (*M'Guinness v. Hunter*, 6 Ir. Jur. O. S. 103; *Hanks v. Cribbin*, 7 Ir. C. L. R. 489; *Blackwood v. Gregg*, Hayes, 277). So, also, if a party object to a charge on the ground of ambiguity, the ambiguity should be distinctly pointed out, and the Judge called upon to clear it up, *Ball v. Mannin* (Sm. & Batty, 454, 462; 3 Bligh, N. S. 22). Again, the refusal of a Judge to withdraw from the consideration of the jury, evidence not objected to at the time of its reception, is not the ground of an exception (*Sedley v. M'Gowan*, 7 Ir. C. L. R. 427); and where upon the trial of a cause certain evidence was admitted, subject to objection, and exceptions were subsequently taken to other rulings of the Judge, but not to the admission of the evidence in question, the party, so excepting was held to have waived his objection to the evidence (*Sedley v. M'Gowan*, 8 Ir. C. L. R. 343).

When objection should be taken.

Should be specifically stated.

The objection must be made at the trial, before the verdict is given (*Culley v. Doe*, 11 A. & E. 1013; *Armstrong v. Lewis*, 4 M. & Sc. 1. The substance of it should be reduced into writing at the time it is tendered, although the bill of exceptions need not then be drawn up in form: the writing so tendered is called a *dominical*. When objections were taken to the Judge's charge, and overruled, and the Judge gave time to have the exceptions reduced into writing, but the *dominical* was not tendered until after the jury were discharged, it was held that the Court could not hear the exceptions (*Close v. Batt*, 1 Ir. Jur. O. S. 256).

Must be made before verdict.

Settling bill
of exceptions

When the exceptions have been taken, and the *dominical* properly tendered, the next step is to settle the bill. In theory, indeed, the bill of exceptions is supposed to be complete, even before the verdict is handed in by the jury (*Thelwall v. Yelverton*, 14 Ir. C. L. R. 188, 212, 213, per Christian, J.) In practice, however, the exceptions are always settled after the trial. The manner of settling them is provided for by the General Orders of 1854, 84-86 (which see). The party excepting is bound to furnish a draft of the bill of exceptions to the opposite party, accompanied by a notice calling on him to return the same in four days settled on his behalf. The time within which this is to be done is prescribed by the 84th General Order (which see, and the cases referred to there). On the expiration of four days from the furnishing of the draft, whether it be returned or not, the party excepting should issue a summons to settle the bill before the Judge who tried the cause, and the bill will then be settled and signed by the Judge. Within two days after it is settled, the party excepting is to file the bill of exceptions, and proceed to make up the paper books for the Judges, and set down the case for argument in the same manner as directed by the 50th General Order with reference to demurrer books. The books are to contain the abstract for Nisi Prius and bill of exceptions, with the names of the counsel and attorneys on both sides, and are to be made out in the same form and manner as demurrer books.

How set
down for
argument
What books
should con-
tain.

When the party excepting is guilty of delay in settling the bill of exceptions, the opposite party cannot issue a summons to settle, but must apply to the Court or a Judge for leave to serve a notice on the exceptant to proceed to settle, or else that judgment will be marked (*Kilroy v. The Midland Great Western Railway Co.*, 4 Ir. C. L. R. 252).

The bill of exceptions should contain what the Judge did, what he was required to do, and what he refused to do (*Ward v. Freeman*, 2 Ir. C. L. R. 460, 520, per Monahan, C. J.). It will, therefore, be insufficient, if it merely states what direction the Judge refused to give, without also stating what direction he actually gave (*Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *Malcolmson v. Morton*, 11 Ir. L. R. 230). So, also, the question which the party required the Judge to leave to the jury should be stated (*Hanks v. Cribbin*, 7 Ir. C. L. R. 489). Where a variance was relied on, it was held that the variance should be specifically stated (*Mawnsell v. Russel*, 2 Ir. L. R. 205, n.). It is not necessary to set out all the evidence; so much of it only should be set out as is requisite to make the exception intelligible (*Watson v. Clooney*, 1 Ir. C. L. R. 58, 62). The finding of the jury on any collateral issues left to them should not, it would seem, be inserted in the bill of exceptions (*Thelwall v. Yelverton*, 14 Ir. C. L. R. 183); nor ought distinct exceptions to different parts of a Judge's charge be allowed (*Strong v. Kean*, 13 Ir. L. R. 93).

Parties con-
cluded by
bill.

On the argument of a bill of exceptions, both parties are concluded by it as to the truth of the matters contained in it, and the Court cannot go behind it to ascertain what the objection made at the trial really was (*Whaley v. Carlisle*, 17 Ir. C. L. R. 792). The exceptions themselves ought to be clear, and leave no doubt as to what was done. The Court will, however, view them with reference to the subject matter, and when it appears that the Judge was sufficiently apprised of what the parties intended by the exceptions, will not scan the wording of them too narrowly (*Clooney v. Watson*, 2 Ir. C. L. R. 129, 135, per Pigot, C. B.); and they will not, accordingly, be

construed with the same degree of rigour as if they were the subject of a special demurrer (*Rhodes v. Hunter*, 2 Huds. & Br. 581, 589, 590; *Quin v. The National Assurance Co.*, Jon. & Car. 316, 366; *Burris v. Coffey*, 6 Ir. L. R. 298, 314). In *Butler v. Mountgarrett*, 6 Ir. C. L. R. 77, an exception, which objected to the admission of two letters in evidence, was held to be too wide, as one of the letters was admissible.

The exceptions, as before stated, are, under the 28th Geo. 3, c. 31, s. 1, examinable in the Court in which the action is brought. The object of that Act, however, as clearly expressed in the preamble, is confined to enabling the Court to examine the exceptions without obliging the party to bring a writ of error; and accordingly the Court has no authority to proceed upon any other rule or ground of decision than that according to which the Court of Error formerly acted (*Trimbleston v. Kemmis*, 9 C. & F. 749). The Court, therefore, has no power under the statute in question, to select any particular portion of the evidence set forth in the bill of exceptions, and to allow or disallow the exception upon arguments built upon such portions of the evidence so selected; it is for the party himself to make his objections at the trial, and he is bound by the particular exception he has tendered, and can rely upon no other (*Trimbleston v. Kemmis*, *ubi supra*, *Quin v. National Assurance Co.*, Jon. & Car. 316, 380). If the Court allows the exceptions, there must be a *venire de novo*. It has indeed been considered in some cases that the Court, upon allowing the exception, may, under the statute 28th Geo. 3, c. 31, order judgment to be entered up for the exceptant. If such a power does, however, exist, it is only in a strong case, as for instance, where there is a conclusion of law arising upon the evidence, that the power can be exercised (*Fawcett v. Hall*, Alc. & Nap., 248; *Orr v. Stephenson*, 5 Ir. L. R. 2; *Bell v. Nangle*, 1 Jebb & Syn. 199). It was at one time the practice in this country, upon allowing the exceptions, to award a new trial, by a mere rule or order, in place of awarding a *venire de novo*. The consequence was, that the unsuccessful party was debarred from bringing error. In the case of *The Bank of Ireland v. Evans' Charities*, 5 H. L. C. 389, however (where the whole subject was elaborately discussed), it was held by the House of Lords that the practice was erroneous, and accordingly the practice now is to award a *venire de novo*, on which award error may at once be brought. 19 & 20 Vict., c. 102, s. 49.

Power of Court in giving judgment.

Venire de novo.

Error lies on judgment.

When a bill of exceptions is brought into a Court of Error, after having been adjudicated upon in the Court below, the Court of Error, the whole record being there, will decide upon every question of law arising thereon (*Carlisle v. Whaley*, L. R. 2 H. L. 391; *Ward v. Freeman*, 2 Ir. C. L. R. 460, 474).

As to the costs upon a bill of exceptions, see *Bell v. Potts*, 5 East, 49, 19 & 20 Vict., c. 102, s. 49.

With respect to the form and manner of entering judgment :—

Judgment.

122. No judgment shall be arrested or stayed or reversed by reason of any imperfection, omission, defect in or lack of form (*b*) in any summons and plaint, defence, or other pleading or proceeding, nor by reason that the venue is misplaced, or the trial had in a wrong county or place (*c*), nor

Judgment not to be arrested on technical grounds. 15 & 16 Vict. c. 76, s. 80.

by reason of any misnomer of any of the jurors who tried the case in name, surname, or addition, so as it appear to the Court to be the same man that was meant to be returned, nor by reason that the plaintiff or defendant, being under the age of twenty-one years, did sue or defend by attorney (d).

(b) See *a. 31, ante*, where the same words are used. Where, in an action for the loss of luggage against two defendants as common carriers, it appeared that one of the defendants was in no respect identified with the transaction, and a verdict was consequently directed in his favour, it was held, upon a motion in arrest of judgment, that although the action was partly in form *ex contractu*, yet, inasmuch as the substantial cause of action was the breach of an implied duty, the suit was maintainable against the other defendant (*Keys v. Belfast & Ballymena Railway Co.*, 8 Ir. C. L. R. 167).

(c) It was doubted whether such a defect was cured under the old statutes of *jeofails* (*Heywood v. Reynolds*, 6 Ir. L. R. 1). As to the consequence of a wrong venue, see *ante*, p. 59, note (s), and *M'Mahon v. Leonard*, 4 Ir. C. L. R. 16.

(d) See *ante*, p. 48, note (b), and *Green v. Leclerc*, Ir. R. 1 C. L. 457.

Entry of judgment on the roll unnecessary for execution. 15 & 16 Vict. c. 76, s. 206.

123. It shall not be necessary, before issuing execution upon any judgment under the authority of this Act, to enter the proceedings upon any roll, but on producing, and lodging with the proper officer, a certificate of the name, description, and address of the parties, an entry shall be made in the Judgment Book, signed by the Master, shortly stating the nature of the judgment, and thereupon the costs shall be taxed, and execution issued, according to the practice heretofore used, and the effect of every such entry of a judgment shall be the same as that of a judgment in an action in the form heretofore used; and such entry in the said Judgment Book shall contain a reference to the number of the roll on which such judgment shall be enrolled, and shall contain a column in which any satisfaction of the said judgment may be afterwards entered, if necessary (e).

When judgment may be marked.

(e) Judgment cannot be marked in cases where a verdict or nonsuit is obtained out of Term, until after the expiration of fourteen days. When obtained in Term, it may be marked in four days. Sec. 127, *post*. As to judgment by default, see ss. 96-101, *ante*.

The practice as to marking judgment will be found discussed in *Scott v. Bennett*, Ir. R. 3 C. L. 217.

The judgment is to be considered as marked when the entry is made in the judgment book, even though the costs are not taxed, and it carries interest from that date (*Fisher v. Dudding*, 9 Dowl. 872; *Frewen v. Lethbridge*, 7 W. R. 442). The entry of judgment is not, however, final till the costs have been taxed (*Pierce v. Derry*, 4 Q. B. 635). The plaintiff may, however, at once issue execution without waiting to tax his costs, but by so doing he waives his right to them (*Barnet v. Heron*, 8 Ir. C. L. R. Ap. 19).

The plaintiff should not issue execution immediately after taxing the costs, except where the circumstances of the case render it necessary, and if he do so unnecessarily he may be ordered to bear the expenses of the execution (*Cruikshank v. Moss*, 8 L. T. N. S. 439).

Where judgment was signed for debt, and taxed costs without any notice of taxation, the Court refused to set aside the judgment as irregular (*Field v. Partridge*, 7 Ex. 689).

When a year has elapsed since the trial, it is not, it would appear, necessary to give a month's notice, pursuant to the 178th G. O., 1854, previous to marking judgment (*May v. Wooding*, 3 M. & Sel. 500), and see *ante*, p. 36, note (v).

As to marking a judgment *nunc pro tunc*, see *post*, s. 155.

124. When it shall be required to sign any judgment, the attorney requiring the same shall deliver to the proper officer a correct summary or recital of the proceedings, briefly stating the several pleadings, and the nature thereof, written fairly on parchment, and signed by the attorney, and thereupon the officer shall take off from the pleadings file the several pleadings in the cause in which such judgment shall be required to be made up, and shall place them, together with the said summary prefixed, in consecutive order upon the file of judgments, in the manner now used, or as may be hereafter directed by any general order of the Judges, there to be kept as the permanent records of the Court, and shall upon the said summary give the proper award of judgment (f); and it shall in all cases of enrolling judgments be sufficient to place on the roll a correct copy of the said summary or recital of the proceedings according to fact, together with the award of judgment in proper form, with a reference to the original pleadings on the judgment file, whereby the same may be immediately found and inspected; and no judgment so enrolled under the authority of this Act shall be liable to be disturbed on the ground of error, on account of any omissions hereby authorized: Provided always, that if it shall be deemed necessary, for the prosecution of any proceeding in error or any other purpose, it shall be lawful for the Court to order that the whole or any part of the pleadings shall be transcribed upon the roll, and the same shall be transcribed by the proper officer accordingly (g).

When judgment to be made up, summary of pleadings to be lodged, and judgment marked thereon.

(f) Where at the trial there is a verdict for the defendant upon some of the issues, and a verdict for the plaintiff with damages upon the others, a "summary" which omits the judgment for the defendant on the issues found for him is irregular and will be amended (*Mohan v. Bloomfield*, 13 Ir. C. L. R. 86). Where the summons and plaint contained two counts—one in libel, the other for a false and malicious representation founded upon the same publication, and there was a general finding for the plaintiff, the Court, on a

What summary should contain.

Where general finding.

Where finding not complete.

motion for a new trial, held that the verdict for the full damages found might be entered on the libel count, the evidence not being sufficient to sustain the finding on the other count (*Jones v. McGovern*, Ir. R. 1 C. L. 681). Where in an action for slander two defences were pleaded—one of justification and the other of privilege—and the jury found for the defendant on the plea of privilege, but were discharged from finding upon the other, the Court, under the circumstances, allowed the defendant to enter up a judgment for the plaintiff on the defence of privilege, and retain his verdict upon the other (*Cassidy v. Kincaid*, 10 Ir. Jur. N. S. 176). And see further, as to entering up judgment on the good counts in a declaration where there has been a general finding, and the plaintiff does not wish to take judgment on the remaining counts, Ch. Ar. Pr., 12th ed., p. 463; *Moore v. Great Southern and Western Railway Co.*, 10 Ir. C. L. R. 46; *Quinn v. The National Assurance Co.*, 2 Ir. L. R. 37; *Quinn v. Fitzgerald*, 1 Ir. C. L. R. 552. And see *ante*, p. 58, note (9), as to the costs of issues which the jury was discharged from finding upon. Where after a judgment by default had been marked, the parties were allowed to go to trial, it was held that the judgment by default should be vacated before judgment could be entered upon the *postea* (*Hayden v. Kavanagh*, Ir. R. 5 C. L. 49).

Enrolling judgment.

The award of judgment cannot be complete, nor can the judgment be finally made up until the costs are taxed (*Kyan v. Shee*, 8 Ir. L. R. 268), unless indeed the plaintiff chooses to waive them, note (e), *supra*. As to how the judgment is to be made up in cases where the plaintiff is entitled to no costs or to half costs only, under the present Statute and the Common Law Procedure Act, 1856, see *Bennett v. Scott*, 8 Ir. Jur. N. S. 394, where it was held that a suggestion, suggesting an order of the Court which entitled the plaintiff to his costs, should be expunged from the record; and see the same case in the Exchequer Chamber, Ir. R. 3 C. L. 217.

(g) When error was brought on a judgment on demurrer, the officer was directed to enrol the whole of the pleadings to which the demurrer related (*Luttrell v. McCreevy*, 3 Ir. Jur. O. S. 237). The judgment may, it seems, be enrolled after any lapse of time (*Barrow v. Croft*, 4 B. & C. 388). As to enrolling a judgment *nunc pro tunc*, see *Wright v. Keene*, 10 Ir. L. R. 97; *Martin v. McCausland*, Smythe, 363.

Judgment for money demands without distinction between debt or damages. 15 & 16 Vict. c. 76, s. 95.

125. In all actions where the plaintiff recovers a sum of money, the amount which he is entitled to may be awarded to him by the judgment generally, without any distinction being therein made as to whether such sum is recovered by way of a debt or damages.

Award of costs in vexatious actions. 43 Eliz. c. 6 s. 2; 21 Jac. 1, c. 16, s. 6; 22 & 23 Ch. 2, c. 3 & 4 Vict. c. 24, s. 2.

126. In all actions for a trespass on lands or tenements, assault and battery, or for slander, the plaintiff in such action, in case the jury shall find the damages to be under the value of Forty Shillings, shall not recover or obtain more costs of suit than the damages so found shall amount unto, unless the Judge at the trial shall certify under his hand, on the back of the abstract for Nisi Prius, that the assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the

plaint was chiefly in question, or that the trespass was voluntary or malicious (h).

(h) In an action for slander, if the plaintiff recovers less than forty shillings, he recovers no more costs than damages; and the Judge has no power to certify so as to entitle the plaintiff to any larger sum for costs. Under the corresponding English Statute (21 Jac. 1, c. 16, s. 6), it has been held that actions for slander of title, or for slander of plaintiff's wife, or other actions where the special damage is the gist of the action, are not within the Act (*Lowe v. Harwood*, Cro. Car. 141; *Brown v. Gibbons*, 2 Ld. Raym. 831; *Kelly v. Partington*, 5 B. & Ad. 645).

Slander.

The provisions of the present section do not apply to actions of libel, but by the Statute 31 & 32 Vict. c. 69 (*post*, in the Appendix), a limitation in the amount of costs has been provided where the damages do not amount to forty shillings.

Libel. See 23
 11th. c. 126 &
 31 & 32 c. 69

When the plaintiff gets a verdict for less than forty shillings in an action for assault and battery, he is entitled to no more costs than damages, unless the Judge at the trial certifies on the back of the abstract for Nisi Prius that the assault and battery was sufficiently proved. As to when and how the certificate should be given, see the notes to sect. 97 of the Common Law Procedure Act, 1856, *post*. When the certificate is given, the case is still within sect. 243, *post*, and sect. 97 of the Common Law Procedure Act, 1856; and unless a greater sum than £5 be found for damages, the plaintiff will have to get the certificates mentioned therein, in order to entitle himself to half or full costs, as the case may be. It has been held that an action for an assault in which no battery is proved is within the section (*Fitzgerald v. Gloster*, 4 Ir. C. L. R. 239). Where the action was brought against the defendant for driving a coach against the one on which the plaintiff was riding, *per quod* he was thrown upon the ground, it was held that no certificate was necessary under the former Act (*Chapman v. Spear*, 8 Ir. L. R. 278, 461); but the section is applicable to cases where the trespass has been committed by the defendant's servant (*Harford v. Kinsella*, 5 Ir. C. L. R. 95). Where an injury is done to a personal chattel, or where an injury to a personal chattel is laid in the same count with an assault and battery, or local trespass, provided it be a *substantive independent* injury, and not merely laid or proved in aggravation of damages, the case will not be within the present section (Tidd's Pr. 9th ed., 964; *Barry v. White*, 2 Jones, 28; *Crockett v. Montgomery*, Vern. & Scriv. 473). When the assault and battery is sufficiently proved to the satisfaction of the Judge, he cannot exercise a discretion founded on the other circumstances of the case as to granting or withholding his certificate (*O'Neill v. Egan*, 6 Ir. Jur. O. S. 347).

Assault and battery. *alt.*
Att. & B. 53

In actions for trespass on lands or tenements, if the plaintiff recovers less than forty shillings, he will be entitled to no more costs than damages, unless the Judge certifies that the freehold or title of the land was chiefly in question, or that the trespass was voluntary or malicious, in which event the case will, as above remarked, in reference to actions for assault and battery, fall within sect. 243, *post*, and sect. 97 of the Common Law Procedure Act, 1856, in the cases thereby provided for. As to cases where an injury to a personal chattel is complained of, in addition to a trespass to the realty, see Tidd's Pr., 9th ed. p. 964, referred to above, and also the cases referred to there.

Trespass on lands.

Personal malice is not essential to enable the Judge to certify; and he may certify so as to give costs where the trespass is after notice (*Sherwin v.*

Swindall, 12 M. & W. 783). And see as to the meaning of the words "voluntary or malicious," *Manning v. Chadwick*, 4 Ir. Jur. N. S. 294, whence also it would appear that the Judge is bound to give the certificate when the trespass was voluntary or malicious.

Where judgment by default.

Demurrer.

Where two causes of action.

The provisions of the present Act apply to the case of a judgment by default (*Lampen v. Hatch*, 2 Str. 934; but see *Brennan v. Murphy*, Hay. & Jon. 478. When the plaintiff obtains a verdict for a sum which entitles him to no more costs than damages, these damages determine the amount of the costs he is to receive in respect of the entire suit, including the costs of a demurrer upon which he has been successful (*M'Govern v. M'Namara*, 12 Ir. C. L. R. Ap. 15). When an action of slander was referred to arbitration, "costs to abide the event," it was held that the plaintiff was entitled to full costs, although the damages awarded amounted to less than forty shillings (*Frean v. Sargent*, 32 L. J. Ex. 281). When two causes of action are included in the same summons and plaint, one of which comes within the operation of the present section, and the plaintiff has a verdict on that count, which from its amount disentitles him to more costs than damages, and fails altogether upon the other count, he will not be entitled to any further sum for costs (*Smith v. Harnor*, 3 C. B. N. S. 829; see also *Blackmore v. Higgs*, 15 C. B. N. S. 790). But it would appear that if in such a case the plaintiff succeeds on some of the issues on that cause of action upon which the defendant has a verdict, the plaintiff, though deprived of the costs of the cause by the present section, will be entitled to the costs of these issues (*Sharland v. Loaring*, 1 Ex. 375).

A summons and plaint contained two counts—one for an assault and battery, and the other for the disturbance of a right of way; the defendant paid into Court £5 in discharge of the plaintiff's demand on the second count, which was accepted by him in full satisfaction; and a verdict for the plaintiff for £10 was given for the plaintiff on the first count, but no certificate was given. It was held that the plaintiff was entitled to no more costs than damages, the action after the money was drawn out being one for an assault and battery alone (*Walsh v. Walsh*, 11 Ir. Jur. N. S. 378).

Execution.

Execution after trial.
15 & 16 Vict.
c. 76, s. 120.

With respect to execution (i):

127. A plaintiff or defendant, having obtained a verdict or nonsuit in a cause tried out of Term, shall be entitled, without any rule on the postea or inquisition, to mark judgment and to issue execution in fourteen days, and in a cause tried in Term in four days (j), unless the Judge who tries the cause, or some other Judge, or the Court, shall order execution to issue at an earlier or later period, with or without terms (k); and it shall be lawful for the said Judge before whom the trial has been had, or any other Judge, or the Court, to make such order accordingly: provided that, notwithstanding any judgment signed or recorded or execution issued by virtue of this Act, it shall be lawful for the Court in which such action shall have been brought to order such judgment to be vacated, and execution to be stayed or set aside, and to enter an arrest of judgment, or grant a new trial or new writ of inquiry, as

justice may appear to require (*l*), and thereupon the party affected by such execution shall be restored to all he may have lost thereby in such manner as upon the reversal of a judgment by a proceeding in error, or otherwise as the Court may think fit to direct (*m*).

(i) When the plaintiff's demand is for a debt or liquidated demand in money, arising upon a contract express or implied, he may in default of a defence or demurrer mark a final judgment and issue execution immediately upon the expiration of the time limited by the summons and plaint (sect. 96, *supra*). In other cases of judgment by default, where the amount for which final judgment is to be marked has to be first assessed by the Master or a jury (sects. 98, 100, *supra*), judgment may be marked and execution issued immediately upon the amount being assessed by the Master or the writ of inquiry being returned, unless judgment and execution be stayed in the manner provided for by those sections and by the 63rd and 64th G. Os. 1854. See *ante*, pp. 104-107. Where, however, the inquiry has been speeded before a Judge, the proceedings from the finding to issuing execution are to be the same as in the case of ordinary trials at Nisi Prius (sect. 100, *ante*). In such cases, therefore, the time within which judgment may be marked and execution issued is prescribed by the above section of the Act, and is, in cases where the cause has been tried out of Term, fourteen days, and where tried in Term, four days after the verdict, unless the Judge who tries the cause or some other Judge orders execution to issue at an earlier or later period; note (*k*), *infra*. In computing the respective periods of fourteen and of four days prescribed by the present section, both the day of trial and the day of marking judgment are to be excluded, so that fourteen or four clear days, as the case may be, must intervene between the trial and the marking of the judgment. See *O'Meara v. Foley*, Ir. R. 4 C. L. 116, a case decided under sect. 27, *post*. As to entering judgment on a bond and warrant, see the G. Os. 1854, 93-96.

When
execution
may be
issued.

Independent of statutory enactment, an execution can be issued only upon a judgment of the Court. However, under 3 & 4 Vict., c. 105, s. 27, all rules of any of the superior Courts of Common Law, whereby any sum of money, costs, charges, or expenses are payable to any person have the effect of judgments. Such rules may, therefore, be enforced by execution; and it is not necessary, before issuing it, to apply to the Court for leave (*Wallis v. Sheffield*, 7 Dowl. 793). Previous to the Statute referred to a rule of Court was only enforceable by attachment, and this is still the case in reference to an order directing anything except the payment of money. For the same reason, an award directing a sum of money to be paid, notwithstanding that the submission has been made a rule of Court, cannot be enforced by execution, Ch. Pr., 12th ed., p. 1595.

Execution
upon rules of
Court.

In order to obtain execution in such cases, the award must be made a rule of Court (*Wallis v. Sheffield*, 7 Dowl. 793; *Jones v. Williams*, 11 A. & E. 175; *Kelly v. St. George*, 4 Ir. L. R. 420; and see further as to the mode of enforcing orders, Ch. Pr. 12th Ed., p. 1594. The form of execution on a rule of Court is given in the schedule to the G. Os. of 1854.

By the 31 & 32 Vict., c. 54, execution can be had in this country on an English judgment or Scotch decret, by having a certificate of such judgment or decret registered in the Court of Common Pleas. See the Act, *post*, in the Appendix.

Upon
English and
Scotch
judgments.

As to issuing execution on an order of the House of Lords, see *M'Mahon v. Leonard*, 10 Ir. C. L. R. 444.

Form of writs.

The form of the various writs of execution is provided for by the 105th G. O. of 1854, and may be seen in the schedule annexed to the orders. The 106th G. O., 1854, requires the place of abode and addition of the party against whom the writ is issued to be endorsed. As to the liability of the attorney, in case he endorses an incorrect place of abode or addition, by reason of which the sheriff arrests a wrong person, or seizes goods not belonging to the defendant, see the note to the G. O. in question.

Execution in general.

As to the nature of execution in general, the party in whose favour the judgment has been given may either sue out a writ of *fieri facias* against the goods of the debtor, or (if the judgment has been recovered previous to the 15th July, 1850), he may sue out an *elegit* against any lands of the debtor not acquired by him as a purchaser for valuable consideration since that date; or (with the exceptions afterwards mentioned) he may have a *cupias ad satisfaciendum* against the body. He may also register his judgment as a mortgage against the interest of the debtor in lands; or he may attach the interest of the debtor in stock shares, &c., standing in his own name, or in the name of a trustee for him (sect. 132, *post*); or in stock, shares, money, &c., in the Court of Chancery, or one of the Superior Courts (sect. 35, *post*), or in the Landed Estates Court (23 & 24 Vict., c. 82); or he may attach any debts due to the debtor (Common Law Procedure Act, 1856, ss. 63-69). As to enforcing the specific delivery of chattels, see the Common Law Procedure Act, 1856, s. 80; and as to the expenses, &c., of execution, see s. 130, *post*.

Concurrent writs.

An execution creditor, after suing out one writ, may abandon it before it is executed, and sue out another. He may also issue any number of writs of execution of the same kind at the same time to different counties (104th G. O., 1854); and although in *Hayden v. Shearman*, 4 Ir. C. L. R. 169 (and see also, *Kane v. Bridgman*, 5 Ir. L. R. 222), it seems to have been considered that it would be irregular to issue a *ca. sa.* without obtaining a return to a *fi. fa.* previously issued; yet on the authorities it would appear that a plaintiff may issue such writs concurrently (*Primrose v. Gibson*, 2 D. & R. 193; *Franklin v. Hodgkinson*, 3 D. & L. 554; Tidd's Pr., 9th Ed., 995; *Dunn v. Harding*, 2 Dowl. 803). He cannot, however, act upon both writs concurrently; and if he do, the latter execution will be set aside (*Fennell v. Dempsey*, 1 Ir. Jur. O. S. 64; *Kane v. Bridgman*, 5 Ir. L. R. 222); and this is the case even though the plaintiff abandons the first execution—a *fi. fa.*—(*Sugrue v. Hovenden*, 7 Ir. C. L. R. 318).

It has been held, upon the construction of the Statute 35 Geo. 3, c. 30, s. 31 (Ir.), that where the plaintiff has the defendant in custody under a *ca. sa.* he may issue a *fi. fa.* without previously discharging the debtor, who thereupon becomes entitled to his discharge (*Brien v. Brien*, 1 Hud. & Br. 300, n.; *Barton v. Seymour*, 1 Hud. & Br. 304, n.; but see *Sweete v. Austin*, 1 Hud. & Br. 308, n.).

Arrest Act.

The power of issuing a *ca. sa.* is restrained by the 11 & 12 Vict., c. 28, s. 1, under which (except in actions for malicious prosecution, deceit, libel, slander, criminal conversation, seduction, or breach of promise of marriage) no *ca. sa.* can be issued on a judgment, or order for the payment of a sum not exceeding (exclusive of costs) £10, or on any judgment or order for the recovery of costs only, when such costs due, or to be paid, shall not exceed £10. See the Act, *post*, in the Appendix.

Writs of execution have priority *inter se* according to the time they are delivered to the sheriff, even though they be delivered on the same day (*Hutchinson v. Johnson*, 1 T. R. 729). A creditor, however, who tells the sheriff not to execute, or who otherwise colludes with the debtor, will lose his priority (*Kirwan v. Jennings*, 3 Ir. L. R. 48; *Wall v. Cahill*, Cr. & Dix, Ab. Not. Cas. 370). Under the Statute of Frauds (7 Wm. 3, c. 12, s. 12), the writ bound the defendant's goods, as against a purchaser, from the time it was delivered to the sheriff. Under the Mercantile Law Amendment Act (19 & 20 Vict., c. 97, s. 1), the writ only binds them from the time of actual seizure. In order, however, that a purchaser may be able to claim the benefit of the Act, he must be a purchaser for valuable consideration, and must not have had, at the time of acquiring title to the goods, notice that the writ in question, or any other writ by virtue of which the goods of the owner might be seized or attached, had been delivered to, and remained unexecuted in the hands of the sheriff. It would appear, however, to be doubtful whether the provisions of the Act referred to extend to chattels real. See *In re The Dublin Exhibition Palace Co. (Limited)*, Ir. R. 2 Eq. 158, 163; *O'Brien v. Murray*, 17 Ir. C. L. R. 46.

Priority of execution.

Chattels real.

Effect of execution upon judgment.

When the sheriff has seized the defendant's goods, the defendant is discharged to the extent of the levy, even though the goods be afterwards rescued, 2 Wms. Saund. 343; *Clerk v. Withers*, 2 Ld. Raym., 1072, and see *Spencer v. Thompson*, 6 Ir. C. L. R. 537. When any lands had been extended on an elegit, the plaintiff could in general have no other writ of execution afterwards, except another writ of elegit (see *Lancaster v. Fielder*, 2 Ld. Raym. 1451), and *qu.* whether the principle extends to the case of a judgment mortgage. At common law, if the plaintiff had the defendant once taken in execution, he could not afterwards, even if the defendant died, have another execution (Ch. Ar. Pr., 12th Ed., p. 707); but now, under the 35 Geo. 3, c. 30, s. 31 (Ir.), even the voluntary discharge of a debtor under a *ca. sa.* does not deprive the creditor of his right to issue another execution (*Burns v. O'Leary*, 3 Ir. C. L. R. 1; *Doolan v. Doolan*, 13 Ir. C. L. R. 27). He cannot, however, issue another *ca. sa.* (*Seymour v. Clarke*, 13 Ir. C. L. R. 537).

As to the return of writs of execution, see the G. Os. 1854, 120-125; and the notes thereto.

As to the renewal of executions, see *post*, s. 141.

(j) As to how time is to be computed for the purposes of this section, see the case of *O'Meara v. Foley*, Ir. R. 4 C. L. 116, referred to *ante*, p. 145.

(k) An application for immediate execution may be made either to the Judge who tries the cause, or to some other Judge, or to the Court. The successful party should apply to the Judge at the trial for the order, while the facts are fresh in his recollection. If the facts on which the order is sought did not appear in evidence at the trial, or there has been no trial, an affidavit is necessary (*White v. Byrne*, Glas. 337). An *ex parte* application may be made (*Jenkins v. Tongue*, 29 L. J. Ex. 147). If there be a demurrer pending to a count of the plaint, the Judge may make the order on an undertaking to enter a *nolle prosequi* (*Allsop v. Smith*, 7 C. & P. 708), and so also, even though a bill of exceptions has been tendered, the order may be made if the Judge considers the point frivolous (*Dresser v. Clarke*, 1 C. & K. 752). Where a certificate is given for immediate execution, notice of taxation may be given on the day of trial for the following day, and on that day judgment may be signed and execution issued (*Alexander v. Williams*, 4 D. & L. 132).

Immediate execution.

Respite of
execution.

The unsuccessful party may, on the other hand, apply to the Judge to stay execution beyond the period provided by the Statute. Such an order will not be made except under special circumstances. Where the stay of execution is "until" a certain day, execution may be issued upon that day (*Rogers v. Davis*, 8 Ir. L. R. 399).

Setting aside
execution.

(1) Writs of execution, and the judgments on which they are founded, will be set aside on several grounds which it would be impossible to enumerate here. As to setting aside a judgment and execution, regularly entered up and issued, see *ante*, p. 102, note (x).

Where
judgment
not revived

Executions will also be set aside if irregularly issued or improperly executed. Thus, an execution issued after the death of a plaintiff will be set aside (*Borridge v. Freeman*, Bl. D. & O. 213). So, also, if issued when the judgment should have been revived. See *post*, s. 148, *et. seq.*

Death of
parties.

But the plaintiff's death after execution does not invalidate the writ (*Cleeve v. Veer*, Cro. Car. 459). Where judgment has been recovered against the defendant by a wrong name, an execution issued against him by the same name is regular (*Furlong v. Handcock*, Hay. & Jon. 244). The Court has, on motion, set aside a fraudulent judgment and execution at the instance of creditors prejudiced thereby (*Byrne v. Falvey*, Hay. & Jon. 132). But see Ch. Pr. 12th ed., p. 644. When setting aside executions, the Court will frequently impose terms on the defendant, not to bring an action, and if he do not consent will refuse him his costs (*Cash v. Wells*, 1 B. & Ad. 375); and in *Telby v. Newman*, 12 Ir. L. R. 71, and *Fennell v. Dempsey*, 1 Ir. Jur. O. S. 64, it seems to have been considered that the Court had the power of imposing such terms in every case, and see *Bartlett v. Sinton*, L. R. 1 C. P. 483.

Terms.

Restitution

(m) As to the manner of restitution, see Chitty's Pr. 12th ed., p. 643.

Execution
may issue to
any county.
15 & 16 Vict.
c. 76, s. 121.

128. Any writ of execution, except a Writ of *Habere facias possessionem*, or other writ of possession, may be directed, in the first instance, to the Sheriff of any county, or county of a city, or other shrievalty, as the party suing out the same may think fit, without reference to the county in which the venue is laid, and without any suggestion of the issuing of a prior writ into such county.

Execution to
issue for the
amount
really due.
6 Anne, c.
7, ss. 1, 2.
(1r).

129. When any execution is demanded, the party demanding the same shall lodge with the officer required to issue such writ a certificate signed by the party or his attorney (n) containing such sum as the party demands to be in good conscience due to him after all just and equitable deductions (o), which certificate shall be filed in the office, and the sum mentioned therein entered in the book wherein executions are entered, and also in the body of the said execution that shall issue, as the sum to be levied on foot of the sum adjudged by the judgment or order of the Court; and if the party at whose suit such execution issues shall appear wilfully, fraudulently, and maliciously to have overcharged the party against whom such execution issues, in

such case he shall forfeit to the party grieved treble damages (p).

(n) This is substantially a re-enactment of 6 Anne, c. 7, ss. 1 & 2 (Ir.). In *Cassan v. Southwell*, 2 Law Rec. N. S. 181, a motion to have a judgment and execution set aside as irregular, on the ground that the certificate was not signed by the party, or by his attorney, with their own hand, was refused; and in *Irvine v. Staunton*, 4 Ir. L. R. 270, the Court refused to discharge a defendant arrested under a *ca. sa.*, although no certificate was lodged with the sheriff, pursuant to 6 Anne, c. 7; but the plaintiff was put under terms to enter an appearance to an action to be brought on the Statute by the defendant.

Certificate of amount due.

(o) Where a creditor, having seized the goods of a principal debtor in execution, afterwards caused a return of *nulla bona* to be made, and forebore to sell the goods, and then issued a *ca. sa.* against the person of the surety for the full amount, it was held that the value of the goods seized was an equitable deduction within the meaning of the Act, and that an action lay (*Spencer v. Thompson*, 6 Ir. C. L. R. 537).

Over marking execution.

(p) The action given by the Statute is for overcharging the certificate; an action lies at common law for maliciously overmarking the execution (*Spencer v. Thompson*, 6 Ir. C. L. R. 537); *Gilding v. Eyre*, 10 C. B. N. S. 592. In such an action, or in an action under the Statute, the plaintiff must prove *malice*. The mere fact of a judgment being overmarked does not *per se* warrant a jury in finding malice. The proper question in such a case is—Did the defendant draw the conclusion which he did as to the amount due to him *fraudulently*? (*Mills v. Nerney, Cooke & Alc.* 81). See also *Carmichael v. Waterford & Limerick Railway Co.*, 13 Ir. L. R. 313.

Over-charging certificate.

As a general rule, so long as the judgment on which the execution issued stands, the debtor bring no action, as he is estopped from alleging that any other sum is due than what appears by the judgment (*Kidd v. Cusack, Sm. & Bat.* 63; *Huffer v. Allen*, L. R. 2. Ex. 15; and see *M'Kenna v. Sexton*, 8 Ir. Jur. N. S. 216). It might be otherwise in the case of a judgment marked in a penal sum to secure a smaller one. See *Mills v. Nerney, Cook & Alc.* 81.

In *Crawford v. Cinnamon*, Ir. R. 1 C. L. 325, the plaintiff in the first action sued his attorney for overmarking execution, by reason of which he was sued, and it was held that the bankruptcy of the plaintiff was a good defence.

130. In every case of execution, the party entitled to execution may levy the poundage fees and expenses of the execution by law payable over and above the sum recovered (q).

Expenses of execution, 15 & 16 Vict. c. 76, s. 123.

(q) At common law the sheriff was entitled to no fees, and he is now entitled only to the fees allowed him by Statute. The first Statute allowing the sheriff fees is the 10 Car. 1, Sess. 3, c. 19 (Ir.), which provides that he shall not take, upon an execution against the body, lands or goods of a defendant more than a shilling for every pound, when the sum does not exceed £100, and sixpence for every pound for the overplus.

Sheriff's fees.

By the 6 Anne, c. 7, s. 3, the sheriff was forbidden to take poundage for any greater sum than the amount appearing to be due by the certificate of the execution creditor or his attorney; and in cases where the execution was against the goods, for any greater sum than the amount actually levied and paid over.

By the 43 Geo. 3, c. 46, s. 5, the plaintiff was allowed, in the case of an execution against the goods, to levy the poundage and expenses, over and above the sum recovered; and now, by the present section of the Act, the party entitled to execution is in every case allowed to levy the poundage and expenses of execution.

The plaintiff is entitled to poundage fees and expenses, even where he is not entitled to costs (*Armitage v. Jessop*, L. R. 2, C. P. 12).

On a *ca. sa.*

The sheriff is entitled to his poundage fees on every writ of *ca. sa.* executed by him, even though the defendant be already in custody on another execution (*Taylor v. Ward*, Tidd's Pr. 9th ed., p. 1040). He may sue the plaintiff for the amount (*Bagot v. Malone*, 5 Ir. L. R. 454). Previous to the above section, it was held that, in case of a *ca. sa.*, the defendant could not be detained for the amount of the poundage, nor could the sheriff sue him for the amount (*Chadwick v. Atkinson*, 2 Ir. C. L. R. 37). So that, practically, the plaintiff had to bear the expense; but now, by the above section, the plaintiff is permitted to levy the poundage and expenses in every species of execution.

In cases where a *fi. fa.* is issued, the sheriff is not entitled to poundage where there has been no actual levy, as when the money is paid without a levy (*Nash v. Dickenson*, L. R. 2 C. P. 252). The expenses of the execution may, however, be enforced (*Bayley v. Potts*, 8 A. & E. 272). The sheriff, however, is entitled to poundage, although the judgment and execution be afterwards set aside for irregularity (*Bullen v. Ansley*, 6 Esp. 111). He is also entitled to poundage on the amount paid over to the landlord, under the Statute of Anne (*Davies v. Edmonds*, 12 M. & W. 31).

Expenses of execution.

As to the expenses of execution, as distinguished from fees, the sheriff is not, as against the defendant, directly entitled to any, unless incurred at his instance, or with his sanction. But when the defendant has sanctioned expenses incurred in the preservation of the goods, or in bringing them to a more advantageous sale, or otherwise, the sheriff becomes entitled to them as against the defendant (*Yates v. Meehan*, 11 Ir. C. L. R. Ap. 1; *Stevens v. Rothwell*, 6 Moore 338; *King v. Fitzgerald*, 1 Jones, 35). In the latter case it was held that the auctioneer's fees were not chargeable as against the defendant, it being the sheriff's duty to sell, and the auctioneer not having been employed at the defendant's request. So, also, as against the plaintiff, in the execution, the sheriff is not entitled to charge any expenses beyond his poundage, unless incurred with his sanction (*Moran v. Tyrrell*, 5 Ir. Jur. O. S. 148). If such expenses have been incurred, the plaintiff may levy the expenses so incurred, but he should take care to levy only such reasonable sum as would be allowed on taxation (*Benwell v. Oakley*, 2 Taunt. 174). The plaintiff is not entitled to levy as expenses of execution the expenses of a previous abortive execution (*Salisbury v. Ray*, 8 C. B. N. S. 193).

Interpleader

In cases of interpleader, when a summoning order has been obtained, the jurisdiction of the Courts thereupon attaches, and the costs of keeping and preserving the goods seized, incurred after but not before the making of the order, are within the jurisdiction of the Court (*Yates v. Meehan*, 11 Ir. C.

L. R. Ap. 1). As to the sheriff's costs in cases of interpleader, see the Interpleader Act (9 & 10 Vict. c. 64), *post*, in the Appendix.

In cases of extortion, independent of the remedy by action under the 10th Car. 1. Sess. 3, c. 19, the Court possesses a summary jurisdiction to compel the sheriff to refund. See *Hayden v. Barton*, Long & Town. 682).

Extortion.

131. Under any writ of *fiery facias* may be seized and taken any money (*r*) or bank notes (whether of the Governor and Company of the Bank of *Ireland*, or of any other bank or bankers), and any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money (*s*), belonging to the person against whose effects such writ of *fiery facias* shall be sued out; and the sheriff or other officer shall pay or deliver to the party suing out such execution any money or bank notes which shall be so seized, or a sufficient part thereof, and shall hold any such cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money as a security or securities for the amount by such writ of *fiery facias* directed to be levied, or so much thereof as shall not have been otherwise levied and raised, and may sue in the name of such sheriff or other officer for the recovery of the sum or sums secured thereby, when the time of payment thereof shall have arrived; and the payment to such sheriff or other officer by the party liable, with or without suit, or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment, or of such recovery and levy in execution, as the case may be, from his liability on any such cheque, bill of exchange, promissory note, bond, specialty, or other security; and such sheriff or other officer may and shall pay over to the party suing out such writ the money so to be recovered, or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied; and if, after satisfaction of the amount so to be levied, together with sheriff's poundage and expenses, any surplus shall remain in the hands of such sheriff or other officer, the same shall be paid to the party against whom such writ shall be so issued: Provided that no such sheriff or other officer shall be bound to sue any party liable upon any such cheque, bill of exchange, promissory note, bond, specialty, or other security, unless the party suing out such execution shall enter into a bond, with two sufficient sureties, for indemnifying him from all costs and expenses to be incurred in the prosecution of such action, or to which he may become liable in consequence

Sheriff empowered to seize money, bank notes, &c., and to pay money or bank notes to execution creditor. 3 & 4 Vict., c. 105, s. 20; 1 & 2 Vict., c. 110, s. 12.

thereof, the amount of such bond or the sufficiency of such sureties, or such amount and such sufficiency, to be determined by the Master of the Court in which such action shall be brought, or, if the Court shall so order, by a Commissioner of such Court authorised to take special bail, and the expense of such bond to be deducted out of any money to be recovered in such action.

Seizing
money.

(r) This does not extend to money in the hands of a trustee (*Robinson v. Pease*, 7 Dowl. 93, 94, per Parke, B.), nor to money in the hands of a third person for the use of the execution debtor (*Ex parte Smyth*, 2 Ir. Ch. Rep. 558), and therefore money levied by the sheriff, under a former writ issued by the execution debtor against the plaintiff upon foot of an interlocutory order for the payment of costs, cannot be applied by the sheriff in satisfaction of an execution issued by the plaintiff upon foot of a final judgment (*King v. Knott*, 3 Ir. Jur. O. S. 69). Such money may, however, be attached under the garnishee clauses of the Common Law Procedure Act, 1854 (*Murray v. Simpson*, 8 Ir. C. L. R. Ap. 45). It is doubtful whether money in the actual possession of the defendant can be seized, see Ch. Ar. Pr., 12th ed. p. 654, and *Sunbolf v. Alford*, 3 M. & W. 254, per Parke, B.

Securities
for money.

(s) Policies of assurance on the life of the debtor are securities for money within the meaning of this section (*Stokes v. Cowan*, 30 L. J., Ch. 882, but see *Alleyne v. Darcy*, 5 Ir. Ch. Rep. 56).

Attachment
of govern-
ment and
public stock
and shares.
1 & 2 Vict. c.
110, s. 12; 3
& 4 Vict. c.
82, s. 1; 3 &
4 Vict. c. 106,
s. 23.

132. If any person against whom such judgment shall be entered as aforesaid shall have any government stock, funds, or annuities, or any stock or shares in any public company in *Ireland*, whether incorporated or not, and standing in his own name and in his own right, or in the name of any person in trust for him, or any interest in the dividends, interest, or annual produce of such stock, funds, annuities, or shares (t), it shall be lawful for the Court or a Judge, on application of the party having recovered such judgment, to make an order *ex parte* in the Form No. 7. in the Schedule B. to this Act annexed (u), to attach such stock, funds, annuities, or shares; and such dividends, interest, or annual produce shall be attached (v) in the books of the Governor and Company of the Bank of *Ireland* or any public company, to answer the purposes of such execution, and such stock, funds, annuities, and shares shall not be suffered to be transferred, nor shall such dividends, interest, or annual produce be paid, until such order of attachment shall be withdrawn or discharged or disposed of (w), and no disposition in the meanwhile of such debtor shall be valid or effectual as against such party recovering such judgment and obtaining such order of attachment.

(f) The interest of a judgment debtor in stock, funds, or shares, could not have been seized or attached at common law. However, now, under the above and following sections, the execution creditor may realize the amount of his execution out of any such interest to which the debtor may be entitled. Sects. 132-134 provide for cases where the stock, &c., is standing in the name of the debtor or of a trustee for him. Sect. 135 enables the creditor to attach stock, &c., standing in the name of the Accountant-General of the Court of Chancery, or the Master of one of the superior Courts, and the 23 and 24 Vict. c. 82, provides a remedy for cases where the stock, &c., is in the Landed Estates Court. It will be observed, that in cases falling under the present section, that is to say, where the interest of the debtor is of an immediate kind in the stocks, funds, shares, &c., standing in his own name, or in the name of his trustee, the amount of the execution (assuming that the charging order is not discharged) is paid over to the sheriff in the first instance. In all other cases the amount must be ultimately realized either through a Court of Equity (if necessary), or by application to the Court in which the stocks, &c., are standing.

Attaching
stock and
shares.

How realized.

The words of the above section, and sect. 134, *post*, are very comprehensive, providing as they do, that the interest of the debtor, whether vested or in possession, or contingent only, or in remainder, or in reversion, may be charged. In order, however, that the Court may have jurisdiction, it is necessary that what the debtor is interested in should be government stock, funds, or annuities, or the stock or shares of a public company in Ireland. Accordingly the Court cannot under this section charge money in the hands of a third person for the benefit of the debtor (*Robinson v. Pease*, 7 Dowl. 93), or money lodged in a savings' bank (*M'Alister v. Murray*, 5 Ir. L. R. 92). So, also, where an order to charge a pension granted by the East India Company was sought for, the application was refused (*Morris v. Manesty*, 7 Q. B. 674). It has been held, under the corresponding English Act, that a banking co-partnership making a return to the Stamp Office pursuant to 7 Geo. 4, c. 46, is a public company within the meaning of the Act (*Macintyre v. Connell*, 1 Sim. N. S. 225, and see *Nicholls v. Rosewarne*, 28 L. J. C. P. 273).

What may
be charged.

Money.

Pension.

Shares.

When the securities sought to be charged come within the words of the section, the Court has jurisdiction to make the order, no matter how remote the interest of the debtor may be (*Cragg v. Taylor*, L. R. 1 Ex. 148, L. R. 2 Ex. 131); and accordingly it will in general be sufficient for the applicant to establish a *prima facie* case (*Moore v. Poole*, 6 Ir. Jur. O. S. 180). An order may even be made in cases where it is doubtful whether the debtor has any interest (*Cannock v. Butler*, Ir. R. 2 C. L. 8; *Rogers v. Holloway*, 12 L. J. C. P. 182); or even it would appear when it is doubtful whether the securities sought to be charged are within the Act (*Witham v. Lynch*, 1 Ex. 391). The reason why an order will be made in such cases is that the order is a charge on such interest only as the debtor has, and if, therefore, he has no interest, or the securities in question are not within the Act, the order made is inoperative. The order may, moreover, be confined in terms to "so much" of the stocks, &c., as the debtor is beneficially entitled to (*Fowler v. Churchill*, 2 Dowl. N. S. 562).

Where
debtor's in-
terest doubt-
ful.

In *Johnson v. Hodgins*, 8 Ir. Jur. N. S. 187, where a sum of money was in the Court of Chancery, and a draft settlement had been prepared, and though never executed, had been acted upon, under which the defendant had an interest in the fund, the Court made a charging order. Where a judgment

Judgment
against
executor.

has been recovered against the defendant as executor, or a judgment recovered against the testator has been revived against the executor, an order will be made charging an interest to which the executor is entitled in that capacity (*Buckley v. Devereux*, 3 Ir. C. L. R. 107; *Haly v. Barry*, L. R. 3 Ch. Ap. 452). *Secus*, where the judgment has been recovered against him in his personal capacity (*Butler v. Devereux*, 3 Ir. C. L. R. 108). So also an order will be made where the stock remains in the name of the testator under whose will the defendant is interested (*Cavanagh v. Prior*, Bl. D. & O. 148; but see *Dixon v. Wrench*, L. R. 4 Ex. 154, referred to *infra*); or where the defendant has incurred his interest (*Dunster v. Glengall*, 4 Ir. Jur. O. S. 20; *Hulkes v. Day*, 10 Sim. 41). As to charging a husband's interest in right of his wife, see *Mills v. Horner*, 6 Ir. L. R. 210, *Dingley v. Yeates*, 26 L. J. Ex. 55.

Where
debtor's
interest not
ascertained.

In *White v. Heron*, 5 Ir. L. R. 167, n. it was held that the precise portion of the fund to which the debtor is entitled should be first ascertained; however, in *Synan v. Tuthill*, 7 Ir. Jur. O. S. 288, an order was made charging the residue coming to the owner in a sale in the Incumbered Estates Court, although such residue was not ascertained, and no allocation order had been made; and similar orders have been frequently made (*Cavanagh v. Prior*, Bl. D. & O. 148; *Brown v. Ellis*, 3 Ir. C. L. R. 106; *Warren v. Wyse* 4 Ir. C. L. R. 235.)

Where
debtor inter-
ested in
produce.

The class of cases just referred to, in which the Court will make a charging order notwithstanding that the interest of the debtor is of a remote or contingent nature, must be distinguished from those cases where the debtor has no interest in the stock or shares in question, but only an interest in their produce after the performance of prior trusts. Thus, where a testatrix gave her whole estate and effects, which included stock and shares, to trustees, on trust to pay debts and legacies, and as to the residue of her estate and effects upon trust for the defendant and two other persons; and she directed her trustees to pay the legacies so soon after her death as her means could be judiciously converted into cash, and in any event not later than twelve months after her death; a charging order having been made upon stocks and shares to the extent of the defendant's interest therein in favour of a judgment creditor, it was held that the defendant having no interest in the stock and shares, but only an interest in their produce after performance of the prior trusts, they could not be charged; *Dixon v. Wrench*, L. R. 4 Ex. 154. In such a case the defendant had, in point of fact, no interest in the stock and shares themselves; and if the charging order had been allowed to stand, the trustees could not have carried out the object of the will. See also *Hatchell v. Wyse*, 4 Ir. C. L. R. 286, where the Court of Common Pleas acted upon a similar principle. In *Warren v. Wyse*, 4 Ir. C. L. R. 235, a charging order was, however, made under similar circumstances.

How order
obtained.

As to the effect of a charging order, see note (v), *infra*.

(u) The application for a charging order under this and sect. 134, *post*, is in the first instance made *ex parte*. It should be supported by an affidavit stating the particulars, &c., of the fund sought to be charged, and the nature of the debtor's interest should, if possible, be shown (*Bolton v. Byrne*, 4 Ir. C. L. R. 176). It will, however, as before mentioned, be sufficient to establish a *prima facie* title (*Moore v. Poole*, 6 Ir. Jur. O. S. 180); and the order may be made in terms so as to charge so much only of the stocks, &c., as the debtor is entitled to (*Fowler v. Churchill*, 2 Dowl. N. S. 562; and see further, note (t), *supra*). When the order attaching the stock, &c., has been made, it should be served on the debtor, or his attorney, or as in

note (x), *infra*. When served, the debtor, or any person interested, may show cause against the order. In cases falling under the present section, cause should be shown within twenty days after service. In cases falling under the 134th section the order fixes the time. If no cause be shown, or the Court disallows the cause, a further order will be made, directing payment or transfer of the stock, &c., to the sheriff in cases where the interest of the debtor is in possession; or making absolute the former order in cases where the interest is of a future kind. Where an order directing payment or transfer is sought for, the party must, even if no cause be shown, apply to the Court or a Judge; and it would also appear that, where in cases within the 134th section the party seeks to make absolute the former order, a similar application must be made, inasmuch as the 136th G. O. does not apply.

Inasmuch as an attachment under these sections is in effect an execution, no order can be made where the party is not in a position to issue execution, and the judgment should therefore be revived in case of lapse of time or change of parties (*Nolan v. Hornidge*, 1r. R. C. L. 48; *Taylor v. O'Keilly*, 6 Ir. Jur. O. S. 236). Having regard also to the words "such execution" in the above section, and to the fact that in cases where the debtor has an immediate interest, the proceeds, &c., are to be paid over to "the said sheriff or other officer" under the 133rd section, it would appear that a writ of *fi. fa.* should be issued in the first instance, as must be done in cases under the 131st section. The same reasons do not apply to cases falling under the 134th & 135th sections, and in *Fletcher v. Egan*, 8 Ir. C. L. R. Ap. 5, it was held that in such cases it is not, according to the practice in the Queen's Bench, imperative on the party to issue execution before making the application, though it is more prudent to do so. It was also stated in that case that, according to the practice in the Common Pleas, an execution must be issued before a charging order can be made.

Notwithstanding that the Act only provides that the order may be made on the application of the "party having recovered" the judgment, the order may also be made on the application of the executor of the judgment creditor, or the equitable assignee of such executor (*Power v. St. George*, 4 Ir. C. L. R. 11). The judgment should, however, in such cases be first revived (*Nolan v. Hornidge*, *ubi supra*). In *Wright v. Millar*, 2 Ir. Jur. N. S. 234, a conditional order was made at the instance of a co-debtor who had paid the entire debt, attaching the interest of the other co-debtor in a fund in the Incumbered Estates Court; it being considered that the case came within the provisions of the Mercantile Law Amendment Act (19 & 20 Vict. c. 97, s. 5, *post*, in the Appendix).

There appears to be some doubt as to whether the Court can give the costs of a charging order. In *Guinness v. Armit*, 3 Ir. L. R. 359, the Court ordered the Taxing Master to tax the costs of the order, but doubted whether they could be charged on the stock. In *White v. Heron*, 5 Ir. L. R. 165, where the defendant had not shown cause the Court refused to give the costs. As a plaintiff in ordinary cases may levy the reasonable expenses of an execution against the defendant (see *ante*, p. 150), it may be that, under sec. 130, the plaintiff is entitled to the costs of the order. The plaintiff should, however, show that he could not have otherwise realized his execution without difficulty or delay. Where a defendant shows cause against an order, the Court has power to make an order as to the costs under sec. 133.

Judgment should be revived.

Issuing execution.

On whose application.

Co-debtor.

Costs-

Effects of order.

(v) The charging order will, however, affect such interest only as the debtor has in the fund, although while the order stands the fund cannot be dealt with, and therefore where the debtor had, previous to the charging order, mortgaged his interest in the fund, but notice had not been given to the trustee, the mortgagee was held entitled to priority (*Scott v. Hastings*, 4 Kay. & J. 633). A charging order when made absolute operates from the making of the conditional order (*Haly v. Barry*, L. R. 3 Ch. Ap. 412).

Responsibility of bank.

(w) Where, after the charging order had been obtained, another charging order and order to pay was obtained by a different creditor in another Court, whereupon the bank paid the amount to the creditor obtaining the second charging order, it was held that it was nevertheless responsible to the creditor who had obtained the first order, *Salaman v. Donovan*, 10 Ir. C. L.R. Ap. 13.

Order for transfer and payment. 1 & 2 Vict. c. 110, s. 15, 3 & 4. Vict. c. 106, s. 24.

133. A copy of such order of attachment shall be served on the debtor or his attorney or agent (x), and unless the said debtor or some other person interested shall within the space of twenty days from the service of such order of attachment and copy, or from the date of the last service, or such other time as the Court or a Judge may think reasonable, show sufficient cause to the contrary, it shall be lawful for the Court or a Judge, if he shall so think fit, on proof of the service of such order of attachment and copy, to make an order on all persons, corporations, and public companies whose act or consent is thereto necessary, to transfer the said government stock, funds, annuities, or shares belonging to the said judgment debtor, and standing in his own name, or in the name of any trustee for him for his own benefit, into the name of the said sheriff or other officer as aforesaid, or to make payment of such dividends, interest, and annual produce to said sheriff, and all such persons whose act or consent is so necessary as aforesaid are hereby required to obey such order, and are indemnified for all things done or permitted pursuant to such order (y): Provided also, that it shall be lawful for such Court or a Judge, on the application of the debtor or any person interested, to discharge or vary such order for attachment, and to award such costs, on such application, as to the said Court or a Judge shall seem just (z).

Service of order.

(x) The order may be served personally out of the jurisdiction (*Wheelhouse v. Sharpe*, 9 Ir. L. R. 154). The section, as may be observed, provides that the copy of the order is to be served on the debtor or his attorney. Where, however, the debtor's attorney had himself obtained a charging order against the fund, service of the order on such attorney was held not to be sufficient without proof that he still continued to act for the debtor (*Martin v. Duffy*, 6 Ir. Jur. N. S. 383); and as to serving the attorney, see further, *Guinness v. Armit*, *ubi supra*. In *Johnson v. Hodgkins*, 8 Ir. Jur. N. S.

187, the Court substituted service on the defendant's father, and an attorney who had previously acted for him. As to substituting service upon the executors in whose name the stock is standing, see *Guinness v. Armit*, *ubi supra*.

All the parties interested must of course be brought before the Court, as, for instance, the assignees of the defendant, if he becomes bankrupt after the making of the charging order (*Mills v. Horner*, 6 Ir. L. R. 210).

(y) See note (w), *supra*.

(z) Where the rights of the execution debtor to the stock, &c., attached are doubtful, or depend on difficult questions of equity, the Court will not discharge the order, but will leave the parties to settle their rights in a Court of Equity (*Cunnoch v. Butler*, 1r. R. 2 C. L. 8; *Rogers v. Holloway*, 12 L. J. C. P. 182; *Cragg v. Taylor*, L. R. 1 Ex. 148, L. R. 2 Ex. 131). So, also, if it be doubtful whether the Court had jurisdiction to make the order it may refuse to interfere (*Witham v. Lynch*, 1 Ex. 391).

Where right doubtful.

If when cause comes to be shown, the motion is heard before a Judge, either party may, if dissatisfied with his decision, appeal to the Court (*Brown v. Bamford*, 9 M. & W. 42; *ante*, p. 4). But the order cannot be entered on the judgment roll for the purpose of being reviewed by a Court of Error (*Newton v. Boodle*, 18 L. J. C. P. 73).

Appeal.

Error.

134. If such debtor shall have an interest in any such stock, funds, annuities, or shares, or the dividends, interest, and annual produce thereof, not vested or in possession, but contingent or in remainder or reversion, it shall be lawful for the Court or a Judge, on a like application, to be made by the party obtaining such judgment, to make an order *ex parte* that such stock, funds, annuities, shares, dividends, interest, or annual produce, or a competent part thereof, shall stand charged with the payment of the amount for which such judgment shall have been recovered, and interest on so much as shall remain unsatisfied, unless satisfactory cause shall be shown to the contrary by the said debtor or some other person interested, within a time to be named in said order, and a copy of such order shall be served on the debtor or his attorney or agent; and unless cause shall be shown to the contrary within the time specified in such order, or such time as the Court or a Judge may think proper, it shall be lawful for the Court or a Judge, if it shall so think fit, on proof of the service of such order, to make same absolute; and such order shall entitle the creditor to all such as he would have been entitled to if such charge had remedies been made in his favour by the debtor: provided that such Court or a Judge shall, on the application of such debtor, or any person interested, have full power to discharge or vary such order, and to award such costs, upon such application as the Court or a Judge may think fit (a).

Charging order on contingent and future interest. 3 & 4 Vict. c. 82, 3 & 4 Vict. c. 106, s. 23.

How realized.

(a) See the notes to sections 133 & 134. When the order is made under this section, the creditor will have to proceed in a Court of Equity to realize his execution.

Order in respect of money in name of Accountant-General. 3 & 4 Vic. c. 82 s. 1, 3 & 4 Vic. c. 105, s. 23.

135. If such debtor shall have an estate or interest in any stock, funds, annuities, or shares, or money, which shall be standing in the name of the Accountant-General of the Court of Chancery, or of the Court of the Commissioners for the Sale of Incumbered Estates in *Ireland*, or the Master of any such Superior Court of Common Law, or in the dividends, interest, or annual produce thereof, it shall be lawful for the Court or a Judge to make such order as to such stock, funds, annuities, shares, and the dividends, interest, and annual produce thereof, as if the same had been standing in the name of a trustee for such judgment debtor; but no such order shall prevent the said governor and company of the Bank of *Ireland* or any such public company from permitting any transfer of such stock, funds, annuities, and shares, or money, or the payment of the dividends, interest, or annual produce thereof, in such manner as the said Court of Chancery, or the Commissioners for the Sale of Incumbered Estates in *Ireland*, or the Court of Common Law may direct: provided, however, that it shall be lawful for the said Court of Chancery or Court of Common Law, or the said Court of the Commissioners for the Sale of Incumbered Estates, on the application of the judgment creditor, to make such order in respect of same as shall be just (b).

Where stock &c. in Court of Chancery.

(b) As to the manner in which an application is to be made to the Court under this section, and the costs of the order, see *ante*, the notes to section 132; where also it will be seen that, before obtaining an order, it is necessary to revive the judgment, and also that it is prudent to issue a writ of execution. As to the nature of the debtor's interest in the fund in order to entitle the plaintiff to an order, see note (z) to section 132. It will be observed that an order attaching the defendant's interest in the fund may be obtained before allocation, if it appears that there is a residue coming to him (*Synan v. Tuthill*, 7 Ir. Jur. O. S. 288; *Byrne v. Mc'Nevin*, 6 Ir. Jur. O. S. 126; and see also *Corah v. Dillon*, 2 Ir. Jur. N. S. 422).

Form of order.

The order will in general be conditional only in the first instance (*Goodly v. Devereux*, 6 Ir. Jur. O. S. 114; *Wright v. Millar*, 2 Ir. Jur. N. S. 234). As to the form of the order, see (*Brown v. Ellis*, 3 Ir. C. L. R. 106).

From what time order binds.

The order when made absolute binds from the time of the making of the conditional order. In (*French v. Balse*, 6 Ir. C. L. R. 63), it was held that if after the making of the conditional order a charging order be obtained from the Court of Chancery, under 3 & 4 Vict. c. 105, and lodged with the Accountant-General before the conditional order is made absolute, the Chancery order would prevail, and in that case it seems to have been

also considered that the lodging of the order with the Accountant-General of the Court of Chancery without obtaining an order from that Court does not charge the stock. However, where a creditor entered a suggestion upon the record entitling him to execution against the executrix of a deceased defendant and obtained an order *nisi* charging shares belonging to the debtor, and upon the same day, but after the making of the order, a decree was made for the administration of the estate of the deceased it was held, an application having been made by the plaintiff in the administration suit to restrain further proceedings by the creditor, that the injunction ought not to be granted, and that a charging order when made absolute operates from the making of the order *nisi* (*Haly v. Barry*, L. R. 3 Ch. Ap. 452).

The remedy given by the above section is confined to judgment creditors at Common Law, and therefore the interest of a debtor in a fund standing in the Landed Estates Court cannot be attached under a decree of the Court of Chancery (*The Commissioners of Charitable Donations v. Archbold*, 14 Ir. C. L. R. 67). Neither can the Lord Chancellor make an order under this section (*Reg. v. Uuiacke*, 4 Ir. Ch. Rep. 492). Courts of Equity may, however, make charging orders under the 3 & 4 Vict. c. 105, sections 23 & 27, in the cases provided for there.

It was held that the Suitors' Fee Fund was money withing the meaning of this section, and that therefore a charging order might be made upon the pension of a defendant payable thereout, (*Quinn v. O'Keeffe*, 10 Ir. C. L. R. 393); and see *Witham v. Lynch*, 1 Ex. 391. The Suitors' Fee Fund has however, been transferred to the Consolidated Fund by 31 & 32 Vict. c. 88.

Suitors' Fee Fund.

Under 23 & 24 Vict. c. 82, the interest of a defendant in stock, &c. in the Landed Estates Court may be attached. The Act in question was rendered necessary by the decision in (*Sawyer v. Norris*, 10 Ir. C. L. R. 168), in which case it was held that the above section did not extend to stock, &c., in that Court.

Stock &c. in the Landed Estates Court.

136. Where to a writ of *feri facias* issued against a beneficed clergyman the sheriff shall have returned *nulla bona* and that the defendant is a beneficed clerk having no lay fee, the plaintiff may as of course issue a writ of execution *de bonis ecclesiasticis*, directed to the bishop of any diocese in which the defendant may have a benefice, and at any time after a writ of execution *de bonis ecclesiasticis* shall have been delivered to any bishop, the plaintiff may apply to the Court by motion for an order that the bishop do certify what has been done under the writ, and that the sequestrator do account; and where, in obedience to any such writ of *feri facias*, *de bonis ecclesiasticis*, a sequestration of the ecclesiastical benefice shall be issued by any bishop, it shall be lawful for any Court in which any judgment shall be had against the same defendant, and execution issued and returned *nulla bona*, to make an order extending the said sequestration to the matter of the said last-mentioned judgment, without any

Execution against a beneficed clergyman.

further writ or proceeding; and the said last-mentioned creditor shall have the benefit of such sequestration, and with priority as from the date of such order of extension, as if it were a sequestration issued at his own instance (c).

Sequestration.

(c) Under the provisions of the Irish Church Act, 1869, writs of sequestration must become very rare. A writ of sequestrari facias is a writ directed to the bishop of a diocese commanding him to make of the ecclesiastical goods of the defendant the amount of the plaintiff's debt. It might be either in the nature of a fieri facias or levari facias, the latter being the more extensive and usual remedy. As in the case of other writs of execution, the judgment should be revived before it issued (*Baker v. Armstrong*, 4 Ir. C. L. R. 177). It is, or was, the only way in which the profits of a benefice could be attached, as the judgment could not be registered as a mortgage against ecclesiastical property (*Luby v. Dixon*, 1 Ir. L. T. 101).

Return of writ.

The bishop with reference to these writs stands in precisely the same situation as the sheriff in reference to ordinary writs, and may be ruled to return the writ, and is bound to obey the order of the Court (*Phelps v. St. John*, 10 Ex. 895). The writ is not, however, returnable till the whole amount of the debt, &c., is raised (*Disney v. Eyre*, Alc. & Nap. 34); but the bishop may at any time be ordered by the Court to certify what has been done under the writ (*Hart v. Vollans*, 1 Dowl. 434), and see the section, *supra*.

Duty of Sequestrator.

The sequestrator, who is appointed by the bishop, may be ordered by the Court to account (*Garstin v. Williams*, 3 Ir. Law Rep. 512); and such an order may be made upon the application, not merely of the plaintiff as provided by the present section, but upon the application of the defendant as well (*Garstin v. Williams*, *ubi supra*). The accounting takes place in the Master's office. The sequestrator when appointed is entitled under the 12th and 13th Vict. c. 67, to recover and sue for in his own name, the profits, &c., of the living, including the rents and profits of the glebe lands, and he is liable for any arrears while in possession, unless he makes out a case of diligence (*Middleton v. Maxwell*, 13 Ir. L. R. 261).

When the sequestrator has been ordered to account, he ought not, pending the confirmation of the Master's report, pay over to the bishop the money in his hands; and if he does, the Court, will, notwithstanding, compel him to bring in the amount (*Galbraith v. Pilkington*, 10 Ir. L. R. 473). If the money has not been paid over to the bishop, but remains in the sequestrator's hands, the Court may order the sequestrator's bond to be handed over to the party entitled to the money (*Galbraith v. Pilkington*, 12 Ir. L. R. 70).

The sequestration of the bishop for non-residence is entitled to priority over the plaintiff's sequestration (*Middleton v. Maxwell*, 13 Ir. L. R. 261). So, also, the expense of keeping the glebe house in repair is a charge on the moiety of the sum levied under a sequestration in priority to the demand of the creditor (*Lardner v. Fitzgerald*, 1 Ir. Jur. N. S. 469).

Return of devastavit not to be made but on finding of jury.

137. No sheriff or other officer shall return a *devastavit* against any defendant, being an executor or administrator, in any action, but upon an inquisition taken on the oaths of twelve lawful men of his county, to whom challenge may be taken; and the plaintiff shall give the defendant ten days

previous notice of the taking of such inquisition, and of the time and place of taking same; and upon the return of such *devastavit* the plaintiff shall be entitled to immediate execution *de bonis propriis* without further rule or judgment (d).

(d) In an action against an executor, the judgment against him (except in cases where a judgment of assets *quando accederint* is taken, as to which see s. 153, *post*), is that the debt, damages, and costs, or the damages and costs shall be levied off the goods of the testator in his hands, if he have so much, and if not, then the costs to be levied off his own goods (2 Wms. Executors, 6th ed., p. 1823; 1 Wms. Saund. 336). If, indeed, he pleads a plea false within his own knowledge, as *ne unques executor*, the judgment for debt, damages, and costs is *de bonis testatoris et si non de bonis propriis*. On the ordinary judgment, however, the writ of execution for the recovery of the debt is a *feri facias de bonis testatoris*. A *ca. sn. or fi. fa.* in the ordinary form against the defendant will therefore be set aside (*M' Stephens v. Hartley*, 20 L. T. N. S. 225); and in order to obtain a writ of execution against the body or goods of the executor personally, the sheriff must return a *devastavit*, which, under the above section, can only be upon the finding of a jury; and see *Ward v. Thomas*, 2 Dowl. 87; 1 Wms. Saund. pp. 219 (8), 303. As to the liability of an executor for a *devastavit* committed by the first executor, see *Coward v. Gregory*, L. R. 2 C. P. 153, and as to the liability of an executrix for a *devastavit* committed by her husband, see *Soady v. Turnbull*, L. R. 1 Ch. 494.

Execution against executor.

By 3 & 4 Vict. c. 105, s. 56, an executor who is plaintiff is liable to pay costs in the same manner as an ordinary plaintiff, unless the Court or a Judge shall otherwise order. As to the liability in general of an executor to costs, see *post*, the notes to sects. 157, 158.

Costs.

138. It shall not be necessary in any case to sue out a writ of *habeas corpus ad satisfaciendum* to charge in execution any person already in the prison of the Court, but such person may be so charged in execution by a side-bar order upon an affidavit that judgment has been signed and is not satisfied, and the service of such order upon the keeper of the prison for the time being shall have the effect of a detainer (e).

Detainer of a prisoner in execution. 15 & 16 Vict. c. 76, s. 127.

(e) This section is only applicable to cases where the debtor is in the Marshalsea (see *M'Donnell v. Anderson*, 6 Ir. C. L. R. 271). In other cases, a *ca. sa.* must be issued and lodged with the sheriff. Previous to the Act, the only cases in which it was necessary for a plaintiff to sue out a *habeas corpus ad satisfaciendum*, was where the debtor was in the King's Bench prison at the suit of an execution creditor, other than the one seeking to detain him. Tidd's Pr., 9th ed., p. 363.

139. A plaintiff or defendant arrested under any writ of *capias ad satisfaciendum* shall be entitled to his discharge from such arrest, on payment or tender to the opposite party or his attorney in the cause, or to the sheriff or gaoler in

Discharge of a prisoner from execution.

whose custody such person may be under such writ, of the amount directed to be levied by such writ (*f*).

Payment to
Sheriff, &c.

(*f*) Previous to the Act, payment of the sum endorsed to the sheriff or gaoler was not a satisfaction of the judgment (*Martin's Case*, 2 Show, 139). And if the sheriff, after such payment, allowed the defendant to go, it was an escape (*Slackford v. Austen*, 14 East, 468).

Sheriff or
gaoler may
discharge
prisoner by
authority of
attorney in
the cause. 15
& 16 Vict. c.
76, s. 126.

140. A written order under the hand of the attorney in the cause, by whom any writ of *capias ad satisfaciendum* shall have been issued, shall justify the sheriff, gaoler, or person in whose custody the party may be under such writ in discharging such party, unless the party for whom such attorney professes to act shall have given written notice to the contrary to such sheriff, gaoler, or person in whose custody the opposite party may be, but such discharge shall not be a satisfaction of the debt, unless made by the authority of the creditor; and nothing herein contained shall justify any attorney in giving such order for discharge without the consent of his client (*g*).

Discharge by
authority of
attorney.

(*g*) The attorney at Common Law has no authority after judgment has been recovered to proceed further (*Butler v. Knight*, L. R. 2 Ex. 109), and therefore the sheriff was liable for an escape if he discharged a debtor, on the authority of the attorney, and it turned out that the attorney had not been authorised (*Conop v. Chalis*, 2 Ex. 484).

It would appear from the above section as though the creditor by discharging the debtor, discharged the debt as well. See, however, 35 Geo. 3, c. 30, s. 31, and *Doolan v. Doolan*, 13 Ir. C. L. R. 27 (referred to *ante*, p. 147).

Renewal of
execution. 15
& 16 Vict.
c. 76, s. 124.

141. A writ of execution, after the commencement of this Act, if unexecuted, shall not remain in force for more than one year from the date of such writ (*h*), unless renewed in the manner herein-after provided, but such writ may at any time before its expiration be renewed by the party issuing it for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, by being marked with the seal of the Court, and with a memorandum, signed or initialed by the officer, of the date of the day, month, and year of such renewal, such seal to be provided and kept for that purpose in the office of the Master of the Court out of which such writ issued, or by such party giving a written notice of renewal to the sheriff, signed by the party or his attorney, and bearing the like seal of the Court, and memorandum signed or initialed by the officer as aforesaid;

and a writ of execution so renewed shall have effect and be entitled to the same priority as the original writ would have had: provided, however, that no writ of *habere* shall be renewed without the special leave of the Court or a Judge (i).

(h) Previous to the Act a writ of execution might be executed at any time before it was returnable (*Perkins v. Woolaston*, 1 Salk. 321), and no limit was fixed by Statute or otherwise as to the time within which it might be made returnable. Moreover, when a *fi. fa.* or *ca. sa.* was taken out within the year and not executed, a new writ of execution might be sued out at any time afterwards without a *scire facias*, provided the first writ was returned and filed and continuances entered from the time of issuing it, Tidd's Pr. 9th ed. p. 1103. A writ of execution, however, now remains in force for no more than one year from the date of it. Whether the day of the date is to be reckoned in the period provided by the section may be a matter of doubt. In *O'Leary v. Loftus*, 10 Ir. Jur. N. S. 133, it was held under section 28 of the present Act, that a writ of summons and plaint issued on the 15th June could not be renewed on the 15th Dec., and see *Anon.*, 1 H. & C. 664. That section, however, expressly provides that the day of the date is to be included in the period of six months, during which it is thereby provided a writ of summons and plaint shall remain in force for the purposes of service. As a general rule, when time is to be computed from a day, the day is to be excluded for the purposes of computation (*Woolrych on Legal Time*, p. 143, *Rutter v. Mills*, Cro. Jac. 662; *Gorst v. Lowndes*, 11 Sim. 434; *Ammerman v. Digges*, 12 Ir. C. L. R. Ap. 1).

How long writ remains in force.

(i) An application to renew an *habere* must be promptly made. Thus, in *Smith v. Connell*, 1 R., 1 C. L. 565, an *habere* was executed in August, 1866; in May, 1867, the plaintiff moved to renew the *habere* upon affidavit, stating that in November, 1866, forcible possession was taken by the defendant, and that the plaintiff had attempted to serve the defendant with civil bill processes, but had been prevented by violence, and the Court, under the circumstances, held that the application was too late, and refused the motion. And see also *Keogh v. Persse*, Ir. R. 5, C. L. 54. If, however, forcible possession is taken after the execution of the *habere*, the Court will renew the *habere* if application be promptly made (*Linehan v. Anthony*, Batty, 453). Otherwise, the only remedy is by a new ejectment (*M'Donnell v. M'Kenna*, 2 Ir. Jur. O. S. 111).

Renewing habere.

When a plaintiff applies for a renewal of an *habere*, either in consequence of the first *habere* not having been executed, or of its execution having proved abortive, he must satisfy the Court that no change has taken place in the position of the parties, and in general the application should be upon notice (*Shea v. M'Donnell*, 7 Ir. Jur. N. S. 366, in which case negotiations had been pending, and the Court directed notice to be served).

If, after judgment, in an ejectment brought by a landlord against a tenant, the landlord has recognised the tenancy as subsisting, the *habere* will not be renewed (*Glengall v. Hickey*, 4 Ir. Jur. O. S. 37). So, also, if a new possession has been given by the plaintiff after execution of the *habere* (*Mahon v. Ejector*, 3 Ir. L. R. 345). In such a case the first execution satisfies the exigency of the writ, and the only remedy of the party is to bring a new ejectment (*M'Donnell v. M'Kenna*, *ubi supra*).

The Court will also require to be satisfied that the lands have not been cropped by the defendant since the former execution of the *habere*, and if they have the plaintiff will be put under terms (*Willington v. Ejector*, BL D. & O. 193; *Walsh v. Ejector*, 3 Ir. Jur. O.S. 316).

Where no change has taken place in the position of the parties and the *habere* has not been executed it will generally be renewed. As to the execution of an *habere* in general, see De Moleyn's Landowners' Guide, 5th ed., pp. 203, 206, 326-328.

Production
of renewed
writ evi-
dence of
renewal. 15
& 16 Vict. c.
76, s. 15.

142. The production of a writ of execution, or of the notice renewing the same, purporting to be marked with such seal, and initialed as aforesaid, showing the same to have been renewed according to this Act, shall be sufficient evidence of its having been so renewed.

Satisfaction
of judgments
by party. See
Reg. Gen.
H. T. 1853, r.
50.

143. When any party who shall have recovered judgment in any of the said Courts, or his personal representative or legal assignee, shall be willing to cause an entry of satisfaction (*j*) thereof, or a memorandum of part payment, to be entered on the record, such party (*jj*) shall execute a satisfaction piece according to the form No. 8. in the Schedule B. to this Act annexed (which satisfaction piece shall not be subject to any stamp duty); and such satisfaction piece shall be executed in the presence of one witness, who shall attest by affidavit the execution of the same (*k*); and thereupon it shall be lawful for any attorney of the said Court employed for that purpose to require the proper officer to enter satisfaction or a memorandum of part payment on the record of such judgment; and such officer shall, on having such satisfaction piece verified as aforesaid, and such requisition lodged with him, enter such satisfaction or a memorandum of part payment on the record accordingly.

Satisfaction
of judgments.

(*j*) The present section provides for cases where the judgment creditor is willing to execute a satisfaction piece. As to entering satisfaction in other cases, see the next section.

(*jj*) Where, after the death of the judgment creditor, his will had been proved in England only, and not in this country, it was held that satisfaction could not be entered upon the record, although the satisfaction piece was executed by the executors (*Fitzpatrick v. Persse*, 6 Ir. Jur. N. S. 129). So, also, when the amount of a judgment had been paid off during the lifetime of the conusee, it was held that probate should be first obtained before the personal representative could satisfy the judgment (*Lowry v. Walker*, 6 Ir. L. R. 127).

When one of the two assignees who had executed a satisfaction piece was in an imbecile state of mind, the Court refused to allow satisfaction to be entered (*Ru'e v. Baillie*, 12 Ir. C. L. R. 49).

(*k*) When the affidavit had been made in Australia before a police magis-

trate, and not before a Master Extraordinary, an order to enter satisfaction was, under the circumstances, made (*Donelan v. Donelan*, 9 Ir. C. L. R. Ap. 9).

144. It shall be lawful for the Court or a Judge to order a memorandum of satisfaction to be entered upon the record of any judgment, judgment roll, or judgment book, if it shall clearly appear to the said Court or Judge that the debt or damages for which the said judgment was obtained have been fully satisfied and discharged (1).

Court may order satisfaction to be entered on judgment fully paid.

(1) As soon as the judgment is satisfied, the judgment debtor is entitled to have satisfaction entered upon the roll. When satisfied under an execution—as, for instance, by a levy under a *fi. fa.*, the debtor may have the writ of execution returned, and satisfaction entered up. If not satisfied in that manner, but by payment, or some other transaction between the parties, the judgment debtor may call on the creditor to execute a satisfaction piece, as provided by the previous section; and if the creditor refuses to execute it he may apply to the Court under this section. The Court will not, however, act under this section except in a clear case, and will not, where there are disputed questions of law or fact, order a memorandum of satisfaction to be entered up (*Clendinning v. Knox*, 1 Ir. Jur. N. S. 125; *Longmans v. Wallace*, 10 Ir. Jur. N. S. 191). Where the amount of the judgment had been paid off to the executors of the conusee, who had obtained probate of the conusee's will in England but not in Ireland, the Court refused to allow satisfaction to be entered up, though the satisfaction piece was executed by the executors (*Fitzpatrick v. Perse* 6 Ir. Jur. N. S. 129; and, in general, the Court must have the personal representative of the judgment creditor before it (*Lowry v. Walker*, 6 Ir. L. R. 127; *Morgan v. Somerville*, 9 Ir. R. C. L. R. Ap. 15); but see *Redmond v. Crawford*, 7 Ir. Jur. O. S. 120. So also where the amount of a judgment had been paid by the representative of the conusor, to three out of four trustees in whom it was vested, the fourth being resident out of the jurisdiction of the Court, the Court refused to allow satisfaction of the judgment to be entered on the record (*Kelly v. Blake*, 3 Ir. C. L. K. 110; *Maher v. Clonbrock*, 2 Jones, 640); but see *Wise v. Creed*, 8 Ir. L. R. 222 (in which latter case the other conusee had disclaimed the trusts by deed). In *Hodder v. Kift*, 3 Ir. C. L. R. 22, the Court refused to order satisfaction to be entered up at the instance of an assignee of the judgment, there being nothing on the record to show his title. The Court has also refused to make an order, even with the consent of a person acting under a general power of attorney from the conusee (*Brennan v. French*, 4 Ir. L. R. 120).

Entering satisfaction.

In *Boyd v. McClean*, 10 Ir. C. L. R. Ap. 37, the Court ordered a memorandum of satisfaction to be entered up, there being a receipt indorsed upon the bond. And for instances of cases where an order has been made, notwithstanding the opposition of the plaintiff, see *Sinclair v. Great Eastern Railway Company*, L. R. 5 C. P. 391 (where the question at issue between the parties was as to the amount of interest payable on the judgment); *Cottenham v. Bodkin* 4 Ir. C. L. R. 263; *Barnett v. Heron*, 8 Ir. C. L. R. Ap. 19. In the latter case the plaintiff, without having taxed his costs, issued execution upon a judgment marked only for the amount of a verdict,

and the Court, upon being satisfied that the amount of the judgment had been paid off, ordered satisfaction to be entered, upon the grounds that the plaintiff, by issuing execution, had waived the costs. See also *Clancarty v. Ormond*, 7 Ir. Jur. O. S. 398, in which case the judgment had been entered up in the name of a wrong person.

Setting aside satisfaction.

When an entry of satisfaction has been improperly made, it will be set aside, and the Court possesses the same jurisdiction in the case of a warrant to satisfy that it does in the case of a warrant to enter up judgment (*Nuttall v. Nuttall*, 4 Ir. L. R. 480); or in such a case an order may be made to enter up a new judgment (*Mahon v. Martin*, 12 Ir. L. R. 489).

The Court will set aside a satisfaction collusively entered up for the purpose of defeating the attorney's lien (*Sullivan v. Murphy*, 4 Ir. Jur. O. S. 155), and see *ante*, p. 69.

Assignment of breaches.

With respect to the assignment and suggestion of breaches on covenants and agreements for payment of any penal sum (*m*).

Assignment of breaches on penal covenant.

145. In any action on any bond, covenant, or agreement for payment of any penal sum for nonperformance of any covenant or agreement contained in any deed or writing (*n*), and whether accompanied by warrant of attorney or not (*o*), the plaintiff may assign one or more than one breach of such covenant or agreement in his summons and plaint (*p*).

Effect of judgment for penal sum.

(*m*) This and the two following sections are substituted for 9 Wm. 3, ch. 10, s. 8, which is repealed by the present Act. Previous to that enactment the plaintiff, if he obtained a judgment in an action on a bond, given as a security for the performance of a collateral agreement, recovered the full penalty of the bond besides costs of suit, and he was also entitled to take out execution for the whole, without any regard to the damages which he had actually sustained by the breach of the condition, and the defendant could only obtain relief against this by application to a Court of Equity. The plaintiff, however, is now prevented by the above and following sections of the Act from recovering the full penalty of the bond, and limited to damages only. In some respects the provisions of the present Act are more comprehensive than those of the 9 Wm. 3, ch. 10, for that Act did not, at least expressly, extend to cases where the bond, &c., was accompanied with a warrant of attorney; see *post*, note (*o*). It was also necessary under that Act, in case further breaches happened, to issue a *scire facias* to assess the damages, while now it is only necessary to file a suggestion; see sec. 147.

Assigning breaches in plaint.

The above section, as may be observed, provides not merely for cases where an action is brought upon a bond, but also for actions on a covenant or agreement for payment of a penal sum for nonperformance of a covenant or agreement contained in any deed or writing. In such an action, therefore, the plaintiff should assign in his summons and plaint the several breaches for which he seeks to recover damages. If, however, he should not do so, and the defendant merely traverses the making of the bond, the plaintiff will be entitled to a judgment for the full amount of the penalty (*Castlereagh Union v. Dillon*, 12 Ir. L. R. 465), and will then have to suggest breaches before issuing execution. In such a case, however, or where judgment goes by default, the plaintiff, in case he does not assign breaches in the summons and plaint, may find himself embarrassed in afterwards suggesting breaches

which have occurred previous to the action; see note (v), *infra*. As to obtaining security for costs in the case of a suggestion of breaches, see *ante*, p. 49.

Where judgment has been entered up by virtue of a warrant of attorney, or by agreement, previous to the happening of a breach, the 157th G. O. 1854, provides that the 147th section of the Act shall be applicable to the first suggestion of breaches. The Crown is not bound to pursue the course pointed out by the Act (*R. v. Peto*, 1 Y. & J. 169, 171); but, with that exception, in all cases coming within the Act, the provisions of the Act are mandatory, and cannot be waived even by the previous agreement of the parties (*Montgomery v. Byrne*, 2 Ir. C. L. R. 230; *Delacour v. Murphy*, 13 Ir. L. R. 195). And an execution, issued without a previous assignment or suggestion of breaches, will be set aside (*Hall v. Blackwell*, 10 Ir. C. L. R. Ap. 38; *Ryan v. Massey*, 2 Ir. C. L. R. 642). So also as regards any breaches taking place after judgment has been entered, the plaintiff must suggest breaches in the manner provided by sec. 147, *post*.

Benefit of the Statute cannot be waived.

(a) The class of cases provided for above should be distinguished on the one hand from those cases where the sum named is treated as liquidated damages, and, on the other, from the case of bonds and other securities for the payment of moneys, which are provided for by 6 Anne, c. 10, ss. 12, 13. In both of the two latter class of cases execution may be issued without any assignment of breaches or further proceedings. As to when a sum named is to be treated as a penalty, and when as liquidated damages, see Leake on Contracts, p. 573; and *Bonsall v. Byrne*, Ir. R. 1 C. L. 573. As regards the other class of cases adverted to, viz. cases where a bond is given conditional for the payment of money merely, the plaintiff may issue execution for such sum as may be due to him without assigning breaches. If, however, he overcharges the execution, it will be set aside, and he may be liable to an action, if it appears that the execution was overcharged maliciously and without probable cause; see *ante*, sect. 129, and the notes thereto; also, *Smith v. Sydney*, L. R. 5 Q. B. 203.

Liquidated damages.

Money bonds.

Where a defendant executed a bond for £620, conditioned for the payment of £310 and interest, and contemporaneously the plaintiff wrote a letter to the defendant, by which he undertook, that upon the defendant effecting a policy of assurance on his life in favour of the plaintiff for the sum of £310, and paying interest thereon, upon the days provided, he would not put the bond or judgment thereon in force, it was held that the plaintiff might issue execution without assigning breaches, the object of the bond not being to secure the performance of a duty or agreement, but the payment of a sum certain which was a *bona fide* subsisting debt (*Quinn v. O'Keeffe*, 10 Ir. C. L. R. 393). Neither does the Act apply where the bond is for the payment of a sum of money in gross at a certain time as a *post obit* bond (*Murray v. Earl of Stair*, 2 B. & C. 82, 90); and see *Smith v. Bond*, 10 Bing. 125, where the distinction between the two classes of cases is discussed. On the other hand, there must be a suggestion of breaches where the bond is conditioned for the payment of money by instalments (*Hall v. Blackwell*, 10 Ir. C. L. R. Ap. 38; *Harrington v. Coxe*, 3 Ir. C. L. R. 87; *Willoughby v. Swinton*, 6 East, 550); unless there be a clause that all is to be due on any default in payment of principal or interest (*James v. Thomas*, 5 B. & Ad. 40; *Buchanan v. Jack*, Ir. R. 5 C. L. 41). So also there must be an assignment of breaches where the bond is conditioned for payment of an annuity (*Ryan v. Massey*, 2 Ir. C. L. R. 642; *Walcot v. Goulding*, 8 T. R. 126).

Post obit bond.

Money payable by instalments.

Annuity bond.

for the due collection of and accounting for moneys by a tax collector (*Stratton v. Codd*, 9 Ir. L. R. 1; *Delacour v. Murphy*, 13 Ir. L. R. 195); for the performance of an award (*Welch v. Ireland*, 6 East, 613); or of any other specific act; see *Power v. Lowe*, 5 Ir. C. L. R. 364, in which case it was held that a suggestion of breaches is necessary, though the contemporaneous instrument controlling the bond is not under seal. Where to an action upon a bond, conditioned for payment of £1000 on a day certain, and for performance of the covenants in a deed, the defendant pleaded a general plea of performance of all things mentioned in the condition, and the plaintiff denied that the defendant paid the £1000; it was held, that as the plaintiff was proceeding solely on the breach for non-payment of the money, it was not necessary for him to assign breaches (*Noakes v. Manser*, 3 D. & L. 17). The section extends, of course, to cases where the agreement under which the penal sum becomes payable is in writing, but not under seal; but there should be something in writing to connect the bond with the agreement (*Hall v. Blackwell*, 10 Ir. C. L. R. Ap. 38, 40).

Bail Bonds and Replevin Bonds are not within the section (*Moody v. Pheasant*, 2 B. & P. 446; 2 Wms. Saund. 187, n. (2)).

(o) Previous to the Common Law Procedure Act, it was frequently held that, where a warrant of attorney containing a release of errors had been given, the Statute of William did not apply (*Austerbury v. Morgan*, 2 Taunt. 195; *Woffington v. Armstrong*, Glasc. 209). Subsequently, however, it was held that breaches should be suggested, notwithstanding that a warrant of attorney had been given (*Burke v. Dublin and Kingstown Railway Co.*, 3 Law. Rec. N. S. 24; *Stratton v. Codd*, 9 Ir. L. R. 1). The Statute puts an end to such questions.

(p) Previous to the Statute of William it was sufficient to assign one breach, and to have assigned more would have amounted to duplicity (*Manser's Case*, 2 Co. Rep. 4 a). As to the necessity of assigning all the breaches under the present practice, see sec. 147, note (r).

146. In all such actions as last aforesaid the jury or the Master shall ascertain the damages in respect of such breach or breaches as shall be proved or admitted, and judgment shall be entered for the full amount of such penalty, with an award of the payment of the damages assessed, if any; and in case the defendant shall pay into Court to the credit of the cause the damages so assessed by the jury or the Master, with the costs of suit, a stay of execution shall be entered on the record of such judgment for that time; and in case the plaintiff shall be paid or satisfied the said damages so assessed, or the penal sum aforesaid, at the election of the defendant, with the costs of suit aforesaid, and of execution, the defendant shall be discharged from such execution entirely, or for that time, and for the amount so paid according as the case may be, and such discharge may be entered on the record of said judgment; but in case the said damages do not amount to the said penal sum, such judgment shall still remain in full force as a further security to answer the plaintiff, his execu-

Bond partly
for payment
of money.

Warrant of
Attorney.

Assigning
several
breaches.

Damages on
breaches to
be ascer-
tained.

tors and administrators, all such damages as may be afterwards sustained by reason of any further breach of any covenant or agreement in said deed or writing, as far as the remainder of such penal sum, after the payment of the damages formerly recovered out of the same, will reach (q).

(q) The proceedings to assess the damages in respect of the breaches are the same as upon an ordinary trial or writ of inquiry. In the case of judgment by default, the plaintiff need not prove the breaches if they have been assigned further than is necessary for the purpose of ascertaining the amount of damage sustained; and see *The Balieborough Union v. Watt*, 5 Ir. Jur. O. S. 108. Damages can only be assessed in respect of the breaches assigned, and there must be a fresh suggestion in case of any breaches occurring after the commencement of the action.

Where judgment by default.

147. In all such actions as last aforesaid, in case judgment shall pass for the plaintiff, and the full amount thereof and the costs of suit shall not have been paid or levied, and afterwards any further breach or breaches shall happen, the plaintiff shall be at liberty to file one or more than one suggestion of such breaches in the form No. 9. in the Schedule B. to this Act annexed, or to the like effect, and such suggestion shall be pleaded to, and the truth of the matters therein suggested shall be tried and damages awarded, and judgment and execution shall be given in like manner, as if the same were on summons and plaint; and upon payment or satisfaction of such further damages and costs further proceedings shall be stayed for that time; and so from time to time, as often as occasion may require, on every new breach, the said judgment may be resorted to, so far as aforesaid, and no further; and upon payment or satisfaction made to the full amount of said penal sum and costs as aforesaid the said defendant, his body, lands, and goods, shall be discharged of all execution in respect of the same (r).

Suggestion of further breaches and execution on same.

(r) By the 157th G. O. 1854, it is provided that the provisions of the present section are to be applicable to the case of a first or original suggestion of breaches as well as as to the case of a further or additional breach, and by the 156th G. O. 1854, a suggestion under the above section may be entered as of course without any rule. As to suggestions, in general, see the note to the 156th G. O. Where the original judgment has been recovered more than six years, or there has been a change of parties, the judgment must be revived before taking further proceedings; and in such a case the plaintiff may, pursuant to the 107th G. O. 1854, suggest breaches in the writ of revivor if necessary. Where the judgment has been entered up in a penal sum to secure a lesser sum, the writ of revivor should not pray for execution of the penal sum, but of the sum intended to be secured (*Barrett v. Driscoll*, 11 Ir. Jur. N. S. 119). For forms of suggestion see Chitty's Forms, 10th ed., p. 536.

First suggestion of breaches.

Reviving judgment.

Breaches
occurring
before the
action.

Nothing can be suggested as a breach which might have been originally assigned or suggested (2 Wms. Saund. 187, c. n. (g), 7th ed., *Harrop v. Armitage*, 12 Price, 441). And although under the practice prevailing in this country, previous to the passing of the Common Law Procedure Act, and still prevailing in England, the plaintiff in case of a judgment on demurrer, or by *nil dicit*, might suggest breaches on the roll where none had been assigned in the declaration; it may be a matter of some doubt, having regard to the difference between the language of the 145th sect. of the present Act, and 9 Wm. 3, c. 10, ss. 8 & 9, Ir. (8 & 9 Wm. 3, c. 11, s. 8, Eng.), whether the plaintiff could adopt such a course in the case of a judgment by default.

Proceedings
to revive.

And with respect to the time within which execution may be issued, and the proceedings for the revival of judgments and other proceedings by and against persons not parties to the record, be it enacted as follows:

Execution
without re-
val. 15 & 16
Vict. c. 76,
s. 128.

148. Writs of execution may be issued, at any time within six years after the recovery of the judgment, by or against the plaintiffs or defendants, or the survivors of them, without any revival of such judgment (s).

When execu-
tion was
issuable at
Common
Law.

(s) At Common Law no execution could be issued upon foot of a judgment after the lapse of a year and a day, the presumption being that the judgment was satisfied. By the statute of Westminster 2 (13th Ed. 1, c. 45), however, the execution creditor was permitted after the lapse of the year and a day to issue a *scire facias*, calling on the opposite party to show cause why execution should not issue; and as the law now stands under the above section, execution may be issued at any time within six years after the recovery of the judgment, unless a new party becomes entitled to or liable to execution, in which case the judgment must be revived. After the lapse of six years the judgment may be revived in the manner provided by the following sections.

According to the practice prevailing previous to the present Act, if the plaintiff had been prevented from suing out execution by proceedings in error, or an injunction, or by reason of the judgment having been entered up with a stay of execution, or by agreement, the time would not begin to run until the proceedings in error were determined, the injunction dissolved, or the time mentioned in the stay had elapsed; Ch. Ar. Pr., 12th ed., p. 1124. And it was also unnecessary to issue a *scire facias*, for the purpose of reviving the judgment previous to issuing execution, if the defendant had agreed to dispense with the necessity for so doing. *Ib.* So, also, when a *fi. fa.*, or a *ca. sa.* was taken out within the year and not executed, a new writ of execution might be sued out at any time afterwards without a *scire facias*, provided that the first writ was returned and filed, and continuances entered from the time of issuing it. Tidd's Pr., 9th ed., p. 1103.

Issuing exe-
cution after
change of
parties.

If an execution be issued after the lapse of six years, or a change of parties upon foot of a judgment which has not been revived, the execution is voidable only and not void (*Blanchenay v. Burt*, 4 Q. B. 707; *Goodtill v. Badtill*, 9 Dowl. 1009). Where after judgment had been entered up, the plaintiff became insolvent, and an execution was thereupon issued by his assignees without any suggestion having been entered upon the record, the execution was set aside (*Carolan v. Nolan*, 7 Ir. C. L. R. 114); where, how-

ever, there are two or more plaintiffs or defendants, and one or more of them die after judgment, execution by *fi. fa.* or *ca. sa.* may be had within six years for or against the survivors without revivor (2 Wms. Saund. 72 *l.*; *Cooper v. Norton*, 16 L. J. Q. B. 364).

Where a party dies after execution issued, there is no necessity to revive the judgment in order to proceed with the execution; and in such a case the proceeds of the execution may be paid over to the executors of the deceased plaintiff (*Cleeve v. Veer*, Cro. Car. 459); or the execution itself, if a *fi. fa.*, may be executed upon the goods of the deceased defendant (*Wither v. Harris*, 2 Ld. Raym. 1073); and on the principle that judicial proceedings are to be considered as taking place at the earliest moment of the day on which they are done, it has been held, that, where a judgment was marked, and execution issued upon the same day that the defendant died, but at a later period of the day than that at which the death occurred, the judgment and execution were regular (*Wright v. Mills*, 4 H. & N. 483). Where the public officer of a company, who was plaintiff, died after the issuing, but before the execution of a writ of *ca. sa.*, it was held that a *scire facias* was unnecessary (*Todd v. Wright*, 15 L. J. Q. B. 364).

After death of execution debtor.

As to obtaining the discharge of a defendant arrested under a *ca. sa.*, when the plaintiff has died and his will has not been proved, nor administration taken out, see *Ryan v. Ball*, 6 Law Rec. N. S. 208; *Broughton v. Martin*, 1 B. & P. 176.

Where it is sought to realize a judgment by obtaining a charging order or a garnishee order, the judgment must be revived in the same manner, and in the same cases as in the case of an ordinary execution (*Nolan v. Hornidge*, Ir. R. 3 C. L. 48).

Charging order.

149. In case it shall become necessary to revive a judgment by reason of lapse of time or of a change, by death or otherwise, of the parties entitled or liable to execution, the party alleging himself to be entitled to execution may apply to the Court or a Judge, on an affidavit ascertaining the amount due, for leave to enter a suggestion upon the record of the judgment to the effect that it manifestly appears to the Court that such party is entitled to have execution of the judgment for the said sum, and to issue execution thereupon for the same, such leave to be granted by the Court or a Judge upon such terms and in such manner as to the Court or a Judge shall seem fit (*t*).

Judgment to be revived by suggestion. 15 & 16 Vict. c. 76, s. 129.

(*t*) When a party seeks to revive a judgment, there are three ways in which he may proceed for that purpose. He may, in the first place, apply for leave to enter a suggestion under this and the following section of the Act; or he may issue a writ of revivor under the 151st section, or he may issue a *scire facias*. The latter was the only manner in which a judgment could have been revived previous to the present Act, and was the remedy given by the Statute of Westminster the second. The proceeding, however by *scire facias* to revive a judgment is now practically obsolete, although it has not been abolished. Independent of the three ways mentioned, there is the Common Law remedy of an action upon the judgment itself, to which it

How judgment revived.

may still in some cases be advisable to resort. See *post*, notes (y), (b); and see also *Waley v. Winsley*, F. & F. 415, where it was held that, when the defendant denies his identity, the proper course to adopt is to bring an action upon the judgment.

In some cases the Court may allow a party to enter a suggestion upon the record, that the judgment has become vested in him, but will at the same time require him to issue a writ of revivor for the purpose of reviving the judgment before allowing him to issue execution. Thus, where new trustees of a judgment were appointed under the Trustee Acts, the Court allowed a suggestion to be entered upon the record of the appointment of the new trustees, and of the vesting of the judgment and the right to sue for and recover the amount thereof in them, and at the same time made an order, that the new trustees should be at liberty to issue a writ of revivor to revive the judgment (*Smith v. Ashe*, 4 Ir. C. L. R. 251; *Stopford v. Evans*, 3 Ir. C. L. R. 75).

When necessary to revive.

Suggestions for the purpose of reviving a judgment are dealt with by this and the following section. The judgment, as before mentioned, must be revived whenever it is sought to issue execution, or take any proceeding upon foot of it after a lapse of six years, or after a change of parties entitled to or liable to execution. The change of parties entitled to execution, spoken of in the section, means a change of parties in whom the legal estate in the judgment is vested. As to the nature of suggestions in general, see the note to the 156th G. O., 1854; and as to the nature of the cases where the party will be allowed to proceed by suggestion, which will only be where the circumstances of the case are clear and simple, see note (u), *infra*.

How application to be made.

When it is sought to enter a suggestion under this section, the party must apply to the Court or a Judge for leave to do so. The application must be supported by an affidavit ascertaining the amount due, and in addition when there has been a change of parties, the applicant must show by proper evidence the nature of the change. Thus, if the application is made by executors, it must be shown that probate has been taken out, and the probate itself should be produced (*Vogel v. Thompson*, 1 Ex. 60).

May be made *ex parte*.

By the 156th G. O., 1854, it is provided, that, in all cases where a suggestion may be necessary (except in cases within the 147th section of the Act), the application for leave to enter the suggestion must, unless where otherwise provided for by the Act, be upon notice to all parties who have appeared in the action or their representatives; and in *Neile v. Smith*, 3 Ir. C. L. R. 76, the Judge required notice of an application for leave to enter a suggestion to be served upon the representative of a deceased consor. However, in *M'Mahon v. Ellis*, 12 Ir. C. L. R. 437 (in which case the suggestion had been entered under the 156th sect. of the Act), the Court of Common Pleas held, that the General Order in question does not apply to suggestions of the description we are considering, but only to cases where it is sought to enter the suggestion under some of the various Acts of Parliament, rendering shareholders in a company liable when judgment has been recovered against the public officer of a company or against the company itself. Accordingly the well settled practice of the Courts in cases where it is sought to revive a judgment less than ten years old, is, that the party may apply *ex parte* in the first instance, and obtain a conditional order to enter the suggestion, which order must be made absolute in the ordinary way (*Edie v. Philips*, 3 Ir. C. L. R. 77; *Taylor v. O'Reilly*, 6 Ir. Jur. O. S. 236). The order may, it would appear, be served abroad (*Stockport v. Hawkins*, 2

Conditional order only will be granted.

D. & L. 204), and personal service may be dispensed with if the defendant is avoiding service (*Dixon v. Thorold*, 9 Dowl. 827). An absolute order may even be made in the first instance, if the circumstances of the case require it, as, for example, if the party against whom it is sought to revive is about to quit the country, or is making away with his property; and in *O'Beirne v. Dowell*, 3 Ir. C. L. R. 119, it was laid down, that, when it becomes necessary to revive a judgment within six years by reason of a change of parties, an absolute order may be made in the first instance. As a general rule, however, a conditional order only will be made. When the judgment which it is sought to revive is more than ten years old, the Courts of Common Pleas and Exchequer are, as a general rule, disinclined to allow a suggestion to be entered, and will leave the party to a writ of revivor; but in the Queen's Bench it is believed that a conditional order may be obtained notwithstanding the lapse of time.

As to the comparative advantages of proceeding by suggestion or by writ of revivor, it will generally be found that a writ of revivor is the better manner of proceeding. As before stated, a suggestion will not be allowed to be entered except where the case appears to the Judge to be a simple one and free from all difficulty. It involves, moreover, the taking out of two orders, viz., the conditional order and the absolute order; while on the other hand a writ of revivor may be issued as of course, and without any rule or order, at any time within ten years after the date of the judgment. If, however, there be reason to apprehend that a sham defence will be put in, the proceeding by suggestion will be preferable.

Comparison
of methods.

150. Upon such application, in case it manifestly appears that the party making the same is entitled to execution, the Court or Judge shall allow such suggestion as aforesaid to be entered in the form No. 10, contained in the Schedule B. to this Act annexed, or to the like effect, and execution to issue thereupon for the amount actually due, and shall order whether or not the costs of such application shall be paid to the party making the same; and in case the said costs shall be so ordered to the party making the application they shall be costs in the cause; and in case it does not manifestly appear, the Court or Judge shall refuse such application, with or without costs; provided nevertheless, that in such last-mentioned case the party making such application shall be at liberty to proceed by revivor or action upon the judgment (u).

Application
for sugges-
tion, 15 & 16
Vict. c. 76, s.
130.

(u) In order that the Court may make an order under this section it is necessary that it should manifestly appear that the party applying is entitled to execution. The suggestion, moreover, is not traversable, and in this respect differs from ordinary suggestions, which when entered upon the roll the party affected by them may either demur or plead to (*Bartlett v. Pontland*, 1 B. & Ad. 704). Accordingly the Court will not permit a suggestion to be entered for the purpose of reviving a judgment except in a plain case, such as a devolution by death; and therefore, where the affidavit of

When sug-
gestion
allowed.

the party seeking the order disclosed a number of special circumstances from which the existence of the judgment was sought to be deduced, the Court refused to permit a suggestion to be entered, the proper course in such a case being to sue out a writ of revivor (*Cohoun v. Semple*, 3 Ir. C. L. R. 114). So, also, where the judgment had become vested in a party after a mesne assignment, and an application was made by the personal representative of that party for the purpose of reviving the judgment against the heir and terre-tenants of the conusor, it was held that the proper course was to issue a writ of revivor (*Mackesy v. Alcock*, 6 Ir. Jur. O. S. 110). When the defendant denies his identity the proper course is to bring an action upon the judgment (*Waley v. Winsly*, 1 F. & F. 415).

Appointment
of new
trustees.

See *ante*, p. 172, for instances of cases where the Court has permitted a suggestion to be entered by new trustees appointed under the Trustee Acts; and see also *Disney v. Hamilton*, 3 Ir. C. L. R. 77, in which case two out of three trustees, who were assignees of a judgment, having disclaimed, the Court made a conditional order allowing the remaining trustee to enter a suggestion under this section. As to cases where it is sought to revive a judgment entered up with stay of execution see *Willis v. Gildea*, 16 Ir. C. L. R. Ap. 23, referred to *post*.

Writ of re-
vivor, and
proceedings
thereunder.
15 & 16 Vict.
c. 76, s. 13L

151. In all cases (*v*) in which it shall become necessary to revive a judgment the party alleging himself to be entitled to execution (*w*) may sue out a writ of revivor (*x*), and such writ of revivor shall be directed to the party called upon to show cause why execution should not be awarded (*y*) for the amount claimed to be due, and shall bear date on the day of its issuing; and after reciting the reason why such writ has become necessary it shall call upon the party to whom it is directed to appear, within eight days after service thereof, in the Court out of which it issues, to show cause why the party at whose instance such writ has been issued should not have execution against the party to whom such writ is directed for the amount claimed to be due (*z*), and shall give notice that in default of defence the party issuing such writ may proceed to execution for such amount, together with the costs of such proceeding (*a*); and such writ may be in the form No. 11 contained in the Schedule B. to this Act annexed, or to the like effect, and may be served (*b*) in any county, and otherwise proceeded upon, whether in term or vacation, in the same manner as a writ of summons and plaint; and the venue in such writ may be laid in any county, and the pleadings and proceedings thereupon (*c*), and the rights of the parties respectively to costs, shall be the same as in an ordinary action, so far as the same may be applicable.

In ejectment.

(*v*) A writ of revivor lies in an action of ejectment (*Doe v. Roe*, 2 Dowl. N. S. 690), but the writ cannot be issued without the order of the Court. 108 G. O. 1854.

(w) As a general rule the party suing out a writ of revivor should be the person in whom the legal estate is vested. In *Taffe v. Kelly*, 4 Ir. L. R. 220, a judgment was allowed to be revived by the personal representative of the *cestui que trust* in the name of the personal representative of the plaintiff.

By whom to be sued out.

An equitable defence to a writ of revivor that the plaintiff had assigned over the judgment is bad (*Sainthill v. Evanson*, 7 Ir. C. L. R. 540, with which compare *Jeffs v. Day*, L. R. 1 Q. B. 372).

(x) A writ of revivor is not an action within the meaning of sect. 20 of the Act, see *ante*, page 17, note (h).

(y) Where one of two defendants was dead a *scire facias* was allowed to be issued against the survivor and the heir and terre-tenant of the deceased defendant (*Keegan v. Deakin*, 4 Ir. L. R. 15). Except, however, in cases where a judgment affects lands, it will survive and cannot be revived against the personal representative of a defendant dying before a co-defendant.

Against whom.

It would appear to be doubtful whether a judgment can be revived against an executor *de son tort* (*O'Malley v. O'Malley*, 11 Ir. L. R. 78; *Shearman v. Bibby*, Cr. & Dix, Ab. N. A. Cas. 618). The course to be adopted in such a case is to bring an action upon the judgment.

Executor *de son tort*.

(z) In a writ of revivor it is sufficient to describe the plaintiff as assignee of the judgment without showing how he is such assignee (*Stapleton v. Bergin*, 4 Ir. C. L. R. 421). In a writ of revivor against the heir and terre-tenants of a deceased conusor the writ of revivor must allege the reisin of the conusor of the lands in respect of which the execution is sought.

What writ of revivor should state.

In every writ of revivor the plaintiff may suggest breaches if necessary, 107th G. O., 1854. A writ of revivor of a judgment obtained for a penal sum given to secure a smaller sum should claim execution only for the sum intended to be secured, and interest due, and not for the penal sum for which the judgment was originally marked (*Barrett v. Driscoll*, 11 Ir. Jur. N. S. 119).

Prayer for judgment.

As to the procedure in cases where a judgment of assets *quando acciderint* has been recovered against an executor, see sect. 153, *post*; which also see for the course to be adopted, where it is sought to obtain execution upon a judgment recovered by or against a woman who marries after the recovery of the judgment; and as to reviving a judgment entered up with stay of execution, see *post*, p. 177.

(a) In an action upon a judgment the plaintiff will not be entitled to any costs without an order of the Court, 43 Geo. 3, c. 46, s. 4. A writ of revivor is not, however, an action upon a judgment. As to obtaining security for costs when a writ of revivor is issued, see *ante*, p. 49.

Action upon judgment.

(b) The power of the Court to substitute service of the proceedings to revive a judgment would appear to be more extensive than in the case of original proceedings. Thus service of a *scire facias* was substituted on a person who had acted as attorney for the conusor, and on one who had acted as his agent, notice of the order being given to the creditors of the conusor who were in possession of his property (*Cartwright v. Bale*, 3 Ir. C. L. R. 31); and see also *Kidd v. Riddle*, 1 Ir. C. L. R. 85, where the Court, under the 172nd G. O. of the 23rd Dec. 1850, allowed service of a *scire facias* upon a conusor absent in America to be substituted by serving his wife. So, also, where a joint judgment had been recovered against two conusors, the Court substituted service on one of the two joint conusors, the

Substituting service.

other consor being out of the jurisdiction, and it being practically impossible to serve him, *Harris v. Nipe*, 8 Ir. C. L. R. Ap. 13; *Bell v. Fyan*, Bl. D. & O. 31; with which compare *Seymour v. Donnelly*, 2 Ir. Jur. N. S. 186; and a conditional order for substitution of service has been made in a case where separate judgments had been recovered against two obligors, (*Watson v. Armstrong*, 4 Ir. L. R. 219).

In the case of a joint judgment, the writ of revivor must be directed to all the defendants (*Panton v. Hall*, 2 Salk. 598), and if, therefore, the plaintiff should find it impossible to effect personal service, or substitute service on some of the defendants, in consequence of their being out of the jurisdiction, he can proceed by an action upon the judgment against the consors within the jurisdiction, who will not be allowed to plead in abatement (*ante*, s. 88); neither will the omission of the defendant, who is abroad, be a variance upon the trial of an issue of *nul tiel record* in such an action (*Cocks v. Brewer*, 11 M. & W. 51).

Defences to writ of revivor.

* (c) The defendant to a writ of revivor cannot plead any defence which might have been pleaded to the original action, and the rule is the same in the case of a proceeding by *scire facias*, even although the writ is sued out upon foot of a judgment recovered against a company in which defendant is a shareholder, and he was no party to the proceedings in the action in which the judgment was recovered (*Bradley v. Eyre*, 11 M. & W. 432).

As a general rule, the only legal defences which can be pleaded in bar to a writ of revivor are, (1) *Nul tiel record*, (2) a release, (3) payment or satisfaction, and (4) the Statute of Limitations (*Willis v. Gildea*, 16 Ir. C. L. R. Ap. 23, *arguendo*).

Release.

As to what amounts to a release of a judgment, see *Shirley v. Shirley*, 1 Ir. Jur. N. S. 127, where it was held that a release by the recoverer to the party under whom the *terre-tenants* claimed, of "all suits and demands" before execution issued, was a sufficient release of the judgment.

Satisfaction.

Payment by one of two joint consors operated, under 6 Anne, c. 10, s. 12 (Ir.), as an extinguishment of the debt against both (*Wheeler v. Doynne*, 3 Law Rec. O. S. 264); but where several judgments had been recovered on a joint and several bond, payment by one consor was not satisfaction of the judgment against the other (*Pardon v. Pardon*, 1 Hud. & Br. 229). It is now, however, provided by sect. 5 of 19 & 20 Vict. c. 97 (the Mercantile Law Amendment Act), that every person who being surety for the debt of another, or being liable with another for any debt, shall pay such debt, shall be entitled to have assigned to him, or a trustee for him, every judgment, speciality, or other security, held by the creditor in respect of the debt, and to stand in the place of the creditor. A creditor cannot, however, receive by such means more than the just proportion to which his creditor is liable. See the Act, *post*, in the Appendix; and see also *Wright v. Millar*, referred to, *ante*, p. 155, from which it would follow that a co-debtor, paying off the debt, may issue execution (in the name of the plaintiff, of course) against the other co-debtor for his proportion of the debt.

Where a *scire facias* had been issued to revive a judgment, the defendant was allowed to lodge a small balance, admitted to be due on foot of the judgment in Court, and plead payment (*Rose v. Marquis of Sligo*, 5 Ir. Jur. O. S. 118). Under sect. 75, *ante*, the defendant, however, to a writ of revivor may now pay into Court a sum of money in discharge of the plaintiff's demand.

When payment is pleaded, the Court will not set the defence aside upon

motion as sham and false (*Forster v. Murphy*, 7 Ir. Jur. N. S. 325). Where a writ of revivor prays for execution generally, a plea in bar of execution against the person only, or alleging that the defendant was arrested under a *ca. sa.* issued upon foot of the judgment, and discharged by plaintiff's consent, is bad (*Doolan v. Doolan*, 13 Ir. C. L. R. 27; *Burns v. O'Leary*, 3 Ir. C. L. R. 1).

The writ must be filed four days before the time for pleading expires, i. e. four days after service, *ante*, p. 35.

Filing writ.

The Statute of Limitations applicable to writs of revivor is 3 & 4 Wm. 4, c. 27, s. 40, *ante*, p. 17, note (h). The twenty years fixed by the Statute begins to run against the judgment from the date of the recovery of the original judgment, and therefore, even though the judgment be revived, the Statute of Limitations will be a good answer to a proceeding taken upon it (*Farran v. Ottiwell*, 10 Cl. & F. 319). If, however, the party sues upon the judgment of revival in place of the original judgment, the Statute will only be considered as commencing to run from the date of the judgment of revival (*Furrell v. Gleeson*, 11 Cl. & F. 702). Where an action is brought upon the original judgment, a recovery in such action does not prevent the Statute from running as against the original judgment (*Walters v. Lidwell*, 9 Ir. L. R. 362). Payment of interest by the personal representative is sufficient to keep the judgment alive against the heir and *tenants* (*Martin v. McCusland*, 3 Ir. L. R. 113, but see as to this case *Waring v. Waring*, 5 Ir. Ch. R. 6; and see also *Murray v. Clarke*, 4 Ir. C. L. R. 610).

Statute of Limitations.

When the judgment is security for payment of money, not to be paid till a future time, the Statute does not begin to run till the happening of the event on which the money is to become payable (*Willis v. Gildea*, 16 Ir. C. L. R. Ap. 23; *Gilman v. Chute*, 11 Ir. L. R. 442; *Crawley v. Kennedy*, 13 Ir. L. R. 407), and where the conusor was tenant for life of the money secured by the judgment, the Court allowed the judgment to be revived, although no part of the principal or interest had been paid to the trustees for more than twenty years (*Dillon v. Kennedy*, 1 Ir. L. R. 296).

Where a judgment is entered up with stay of execution, although the Statute does not begin to run till the happening of the event, yet the Court will allow the judgment to be revived, but with a stay of execution (*Willis v. Gildea*, 16 Ir. C. L. R. Ap. 23; *Perrin v. Blake*, Smyth, 539), in the former of which cases the original judgment had by mistake been entered up without a stay of execution. See, however, *Banes v. Banes*, 1 Law Rec. O. S. 236, of which case a more correct report is given in the argument in *Willis v. Gildea*, *ubi supra*.

When entered up with stay of execution.

Plea of payment of judgment. See 6 Ann, c. 10, s. 12, (Ir).

152. In any action on a judgment, or in any proceeding by writ of revivor to revive a judgment, or to have execution for the sum remaining due and unsatisfied on foot of such judgment, if the defendant hath paid the money due on such judgment or the balance claimed on foot of same, such payment shall and may be pleaded in bar of any such action or proceeding by writ of revivor (d).

(d) Payment is a bad plea to a *scire facias* on a recognizance. (*The Queen v. Walker*, 1 Ir. L. R. 381).

Writs of
scire facias
in other
cases. 15 &
16 Vict. c. 76,
s. 132.

153. All of writs *scire facias* (e) issued out of any of the superior Courts of Law at *Dublin*, against bail on a recognizance (f), against members of a joint stock company or other body upon a judgment recorded against a public officer or other person sued as representing such company or body, or against such company or body itself (g), by or against a husband to have execution of a judgment for or against a wife (h); for restitution after a reversal in error (i), or for recovery of land taken under an elegit, or for execution against a personal representative on a judgment of assets *quando acciderint* (g), shall be dated, directed, and proceeded upon in like manner as writs of revivor.

How directed.

(e) The writ of *scire facias* in the cases provided for by this section is to be directed to the parties and not to the sheriff (*Clarke v. Hinds*, 7 Ir. C. L. R. 446), and the service is to be effected in the same manner as in the case of a summons and plaint (*Bergin v. Pepper*, 7 Ir. C. L. R. 45).

Against bail.

(f) The venue, in cases where a *scire facias* is issued against bail on a recognizance, may be laid in any county (*Attorney-General v. Hartly*, Hay. & Jon. 763; *Rex v. Linney*, Cr. & Dix, Ab., Not. Cas. 122). It is unnecessary to set out in the writ the condition of the recognizance (*Attorney-General v. Upton*, 7 Ir. L. R. 505). As to the pleadings on a *scire facias* on a recognizance, see *Clarke v. Hinds*, 7 Ir. C. L. R. 446; *Laverty v. Duffin*, Alc. & Nap. 295; *The Queen v. Walker*, Ir. L. R. 381).

Against
shareholder
in company.

(g) As to issuing a *scire facias* against a present or past member of a banking, railway, or other company, see 6 Geo. 4, c. 42, s. 18; and 8 Vict. c. 16, s. 36, and as to the practice upon the issuing of such writs, and the pleadings, and other proceedings in connexion therewith, see *Byrne v. Dublin and Bray Railway Co.*, 2 Ir. C. L. R. 392 *Carroll v. Kennedy*; 2 Ir. Jur. N. S. 15, 6 Ir. C. L. R. 6; *Neale v. M'Donald*, 6 Ir. L. R. 163; *Rigby v. Dublin, &c. Railway Co.*, L. R. 2 C. P. 586; *Ilfracombe Co. v. Poltimore*, L. R. 3 C. P. 88; *Ilfracombe Co. v. Devon Railway Co.*, L. R. 2 C. P. 15; *Scott v. Uzbridge Railway Co.*, L. R. 1 C. P. 596, *Shrimpton v. Sidmouth Railway Co.*, L. R. 3 C. P. 80; *Williams v. Sidmouth Railway Co.*, L. R. 2 Ex. 284, and Ch. Ar. Pr., 12th Ed. p. 1188.

It is not necessary in such a case that a *scire facias* should issue, but if the liability be denied, it would appear that it can only be tried in that manner (*Burke v. Dublin Railway Co.*, L. R. 3 Q. B. 47; and see *Guest v. Worcester Railway Co.*, L. R. 4 C. P. 9).

Against
husband and
wife.

(h) The case of a female plaintiff or defendant marrying pending the action is provided for by sect. 161, *post*, where also, it will be seen, that in case a woman marries pending the action, the judgment may be executed against her alone, or by suggestion, or writ of revivor against the husband and wife.

A judgment, moreover, recovered by the wife before or after marriage in an action commenced by her when sole, may be enforced by the husband without any writ of revivor or suggestion. The husband may, however, make himself a party to the record; see the note to the section. The Court will not grant an absolute order, in the first instance, for a *scire facias* against

husband and wife on a judgment obtained against the wife *dum sola* (*M'Clean v. M'Neill*, 1 Jebb & Sym. 610). As to the proceedings in case of marriage after interlocutory and before final judgment, see sect. 161, *post*, and *Coates v. Shields*, 11 Ir. L. R. 216, where it was held that according to the old practice, it was unnecessary in such a case to issue a *scire facias*, and that the proper course was to enter a suggestion. In connexion with this subject the provisions of the Married Woman's Property Act, 1870 (33 & 34 Vict. c. 93), should be borne in mind. See the Act, *post*, in the Appendix.

(i) See *Strange v. Phelan*, 2 Ir. Jur. O. S. 84. As a general rule, after reversal of proceedings the Court will relieve the party in a summary manner without putting him to a *scire facias*.

Restitution.

(j) This is the only way of obtaining execution upon a judgment of assets *quando accederint*, and if an execution be issued upon such a judgment without first issuing a *scire facias*, the execution will be set aside for irregularity (*Smith v. Bunbury*, 6 Ir. Jur. O. S. 378). As to what must be stated in the writ, see 2 Wms. Saund., 218 (a); and see also 1 Wms. Saund., 336 (b). When a writ of *scire facias* is issued upon foot of a judgment of assets *quando accederint*, the writ should not pray for execution of assets generally, but of such assets only as have come to the executor's hands since the former action (*Mara v. Quin*, 6 T. R. 1). A judgment of assets *quando accederint* embraces not only such assets as were received by the defendant after the signing of the judgment in the previous action, but such assets also, as came into or ought to be in his hands after the issuing of the writ, or the plea in such previous action. If such assets have been received during the progress of the former action, the plaintiff in such action should not in answer to a plea of *plene administravit* reply the receipt of such assets, but should take the ordinary judgment of assets *quando accederint*, and then issue a *scire facias* (*Smith v. Tateham*, 2 Ex. 205).

Execution upon judgment of assets *quando*.

154. A writ of revivor to revive a judgment less than ten years old shall be allowed without any rule or order; if more than ten years old, not without the order of the Court or a Judge (k).

Writ of revivor, how procured. 15 & 16 Vict. c. 76, s. 134.

(k) By the 109th General Order, 1854, it is provided that, "when an application shall be made to issue a writ of revivor on a judgment above ten years from the entry thereof, the same shall be grounded on an affidavit stating the amount remaining due on foot of the judgment, and the character in which the applicant claims to be entitled to issue the writ, and against whom the same is sought to be issued, and in case twenty years shall have elapsed from the entry of the judgment, such affidavit shall state matter sufficient to take the case out of the Statute of Limitations, and in the latter case, the order shall be conditional only in the first instance, unless for special reasons the Court shall otherwise direct."

Issuing writ.

When it becomes necessary to apply for leave to issue the writ, the Court before giving leave to issue it requires the best possible evidence to show what money remains due on foot of the judgment. Therefore in the case of a judgment recovered by a banking company, an affidavit by the solicitor was held to be insufficient, as it should have been made by some officer whose province it was to know of payments (*Bank of Ireland v. Anon.*, 9 Ir. L. R. 266). So, also, where the application is made by

What affidavit should show.

the assignee of a judgment, the original conusee should join in the affidavit for the purpose of showing what money remained due at time of the assignment (*Agar v. Phaire*, 11 Ir. L. R. 330; *Lynch v. Blake*, Smythe, 141). The Court will of course dispense with an affidavit by the conusee under special circumstances (*Agar v. Phaire*, *ubi supra*; *Henry v. Burke*, Glasc. 209).

Where judgment over 20 years old.

When the judgment is over twenty years old, the circumstances taking the case out of the Statute of Limitations must be fully stated, and therefore, where payment of principal and interest is relied on, the particulars of such payments, viz.: when, where, by whom, and to whom, should be stated (*Anon v. Anon*, 4 Ir. L. R. 104; and see *Loveless v. Richardson*, 2 Jur. N. S. 716). Where the affidavit neglected to state by whom the payments had been made, it was held insufficient (*Wigmore v. Wigmore*, 1 Ir. L. R. 103). The Court has allowed a writ to issue (but without prejudice to any question which might arise under the Statute of Limitations), in cases where the circumstances relied on were the existence of administration suits (*Gower v. Monks*, 6 Ir. L. R. 343; *Mazier v. Oldis*, 5 Law Rec. N. S. 295); also where a previous order had been made for liberty to issue a *scire facias* (*Lynch v. Bourke*, 3 Ir. L. R. 286, *Kelly v. Croghan*, Smythe, 293; but see *Palmer v. Algeo*, 1 Jebb & Sym. 501), and also where the conusor was tenant for life of the fund secured by the judgment (*Dillon v. Kennedy*, 1 Jebb & Sym. 579).

As to cases where the original judgment was entered up with stay of execution, see *ante*, note (c).

Granting absolute order.

If a conditional order would not have the effect of preventing the plaintiff from being barred by the operation of the Statute of Limitations, an absolute order would probably be made (*Crawford v. Piers*, 2 Jebb & Sym. 402).

Death,
Marriage,
Bankruptcy.

With respect to the effect of death, marriage, and bankruptcy upon the proceedings in an action:

Action not to abate by death. 15 & 16 Vict. c. 76, s. 136.

155. The death of a plaintiff or defendant shall not cause the action to abate, but it may be continued as herein-after mentioned (1).

(1) This, and the following sections, provide for the case of the death of one or more of the parties to an action before final judgment is marked. The death of a party in an action of ejectment is provided for by sects. 212, 221, *post*.

Abatement of action by death.

With a few exceptions, afterwards mentioned, if any of the parties died before final judgment, the suit became abated by the Common Law, and a new action had to be brought whenever the right survived. (Tidd's Pr., 9th Ed. p. 932). If either of the parties died after final judgment, the death did not of course render the proceedings abortive, and execution could be had by means of a *scire facias*, *ante*, p. 170, note (s). To remedy the inconvenience arising from the abatement of suits by reason of the death of the parties, various acts were passed from time to time. By the 7th Wm. 3, c. 7, s. 2 (Ir.), (re-enacted by sect. 159, *post*), the case of a party dying between verdict and final judgment, was provided for, and by 9th Wm. 3, c. 10, ss. 6, 7 (Ir.), the cases of death between interlocutory and final judgment, and of the death of one or more of several plaintiffs or defendants

Statutory provisions.

leaving a survivor or survivors were provided for, but until the present Act was passed, there was no enactment providing for the case of the death of a sole plaintiff or defendant before a verdict or interlocutory judgment. The whole subject is now regulated by the above and the following sections of the present Act, and by section 93 of the Common Law Procedure Act of 1856. Sect. 156 provides for the case of the death of one or more of several plaintiffs or defendants leaving a survivor or survivors. Sects. 157 and 158, and sect. 93 of the Common Law Procedure Act, 1856, for the case of the death of a sole plaintiff or defendant, sect. 159 for the case of the death of a party between verdict and judgment, and sect. 160 for the case of death after interlocutory and before final judgment.

With the exception of cases where the party dies between verdict and final judgment, the provisions of the Act only apply where the right of action survives, and accordingly, with the exception mentioned, the only case in which an executor can continue an action commenced by his testator, or in which an action can be continued against him, is where, if no action had been commenced in the lifetime of the testator, the executor might have maintained one against the defendant, or the plaintiff have maintained one against the defendant (*Flinn v. Perkins*, 32 L. J. Q. B. 10; *Leitrim v. Madisson*, 1r. R. 3 C. L. 601); and even in cases where the executor or administrator may bring an action under Lord Campbell's Act (9 & 10 Vict. c. 93), he cannot, except in cases within the 159th sect., continue proceedings already instituted by the testator.

When applicable.

Notwithstanding, however, the rule of the Common Law just adverted to, that the proceedings in an action become abated by the death of either of the parties, yet if judgment be signed and execution issued on the day of the death of the defendant, the judgment and execution are regular, even though the defendant died at an earlier period of the day than that at which the judgment was signed and execution issued (*Wright v. Mills*, 4 H. & N. 488), and the principle upon which that decision proceeded was stated to be that judicial proceedings are to be considered as taking place at the earliest period of the day on which they are done.

Marking judgment after death.

Again on the principle that "*actus curiae nemini facit injuriam*," the Court will, in general, permit a judgment to be entered *nunc pro tunc* where the signing of it has been delayed by the act of the Court or a Judge: that is to say, the Court will permit the judgment to be entered up as of the date when it might have been marked were it not for the act of the Court or Judge; and if the party were alive at that time the proceedings will be perfectly regular. Therefore, if a party die after special verdict, or after a special case has been stated for the opinion of the Court, *Denison v. Holiday*, 26 L. J. Ex. 227; or after a motion in arrest of judgment, or after a bill of exceptions has been taken, and the case has been placed in the list (*Alford v. Reggs*, 12 Ir. L. R. 528); or after a motion for a new trial, or after a demurrer set down for argument, the Court will, independent of the statutory enactments referred to, allow judgment to be entered up after his death *nunc pro tunc*. So also where the death has taken place pending the time taken for argument, or while the Court are considering of their judgment, or within a reasonable time after judgment is pronounced (*Miles v. Bough*, 3 D. & L. 105; *Moor v. Roberts*, 27 L. J. C. P. 161). But if the judgment was not entered up by reason of the laches of the plaintiff or those representing him, or by reason of a proceeding in the common course of law, the Court will not allow the judgment to be entered up *nunc pro tunc* (*Miles v. Bough*, 3 D. & L. 105, p. 108; *Bates*

Judgment *nunc pro tunc*.

v. Lockwood, 1 T. R. 637. Where, however, the Court allows judgment to be entered up in the manner mentioned, it is necessary that a representative of the deceased shall be brought before the Court, as the proceedings will not be allowed to go on in the absence of a responsible party, although it is not necessary that probate should be actually taken out (*Wallace v. Brown*, 4 Ir. Jur. N. S. 84; *Thomas v. Dunn*, 1 C. B. 139). And see further, as to entering judgment *nunc pro tunc*, s. 159, *post*, note (x).

In the cases mentioned the judgment is entered up in the name of or as against the deceased party. The usual proceedings will have to be then taken to revive.

Interlocutory order.

In the case of an interlocutory order being made for the payment of costs to a party, who then dies, his personal representative is entitled to be paid the amount, notwithstanding the abatement of the action, and may obtain an attachment for the purpose of enforcing payment (*Brownrigg v. Hamilton*, Alc. & Nap. 170).

Proceedings on death of one of several plaintiffs or defendants. 9 Wm. 3, c. 10, s. 7 (Ir.); 8 & 9 Wm. 3, c. 11, s. 7, (Eng.); 15 & 16 Vict., c. 76, s. 136.

156. In case there be two or more plaintiffs or defendants, and one or more of them shall die, if the cause of action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the action shall not be thereby abated (m); but, such death being suggested upon the record (n), the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants (o).

(m) This is substantially a re-enactment of the 9th Wm. 3, c. 10, s. 7, Ir. The words "if the cause of action shall survive, &c.," are not, however, to be found in that Act, although they do occur in the corresponding English Act, 8 & 9 Wm. 3, c. 11, s. 7, from which the above section is taken. Previous to those enactments the death of one or more of several plaintiffs or defendants pending the suit caused the action to abate. There were, however, some exceptions to this rule, as the death of one or more of several defendants in an action of *tort*, or of one or more of the plaintiffs in *quare impedit* or *audita querela*, did not cause the proceedings to abate, 2 Wms. Saund., 72 i, k.

When right survives.

The present section, as will be observed, is only applicable to cases where the right of action survives. As a general rule, when an action is brought by or against parties jointly, the right survives in the case of the death of one of them. However, in the case of an action brought by or against husband and wife in right of the wife, in case the wife should die the right does not survive (*Checci v. Powell*, 6 B. & C. 253); and consequently the action cannot be proceeded with by or against the husband under this section. On the other hand, if the husband should die the right survives to the wife (*Sharrington v. Yeates*, 12 M. & W. 855); and see s. 55, *ante*, p. 52.

Action by husband and wife.

Suggesting death.

(n) The suggestion mentioned in the text should be entered and filed before any further proceedings are taken (*Pinkus v. Sturch*, 5 C. B. 474; *Larchin v. Buckle*, 1 L. M. & P. 740). If the death happens before the settlement of issues it should be suggested upon the record (*Far v. Den*, 1 Burr. 362). If it happens after the settlement of issues it should also be suggested upon the record (*Rez v. Cohen*, 1 Stark, N. P. 511). In *Bouhier v. Wood*, Glasc. 75, where a co-plaintiff had died after action brought, and before issue joined, the Court allowed a suggestion to be entered on the record after verdict, on the principle that whilst a record of the Court remains there

it is amenable at the discretion of the Court. Compare with this, however, *Barnewall v. Sutherland*, 1 L. & M. 159, and mentioned in the note to the next section. In *Whalley v. Lord Massareene*, 9 Ir. Jur. N. S. 417, where a co-defendant died pending the argument of a bill of exceptions taken at the trial, and the plaintiff entered up judgment of *venire de novo* against all the defendants, the Court allowed the plaintiff to amend the record by suggesting the death of the co-defendant who had died. In *Newham v. Law*, 5 T. R. 577, where one of two plaintiffs died before interlocutory judgment, and execution was issued in the name of both, the Court allowed a suggestion to be entered on the record and the execution to be amended.

It is unnecessary to apply to the Court for leave to enter a suggestion under this section, the 156th G. O. 1854, not being applicable (*M' Mahon v. Ellis*, 12 Ir. C. L. R. 437). The suggestion may also be entered by either plaintiff or defendant *Pell v. Linnell*, L. R. 3 C. P. 441; and it would appear that the suggestion when entered may be traversed, although suggestions under the 149th section are not traversable. The general rule applicable to suggestions, except where otherwise specially provided, is that after the entry of the suggestion the party sought to be affected may either demur or plead to the suggestion (*Bartlett v. Pentland*, 1 B. & Ad. 704. As to the consequences of the death occurring after service of notice of trial as affecting the costs of the day for not going to trial, see *Pell v. Linnell*, L. R. 3 C. P. 441, referred to, *ante*, p. 114.

May be entered with-
out leave.

As to the form of the suggestion see Chitty's Forms, 10th Ed. p. 876, *et seq.* and see also Bul. & Lea. Pr. Pl. 2nd Ed., p. 10.

(o) After the death of a party the proceedings should be continued in the names of the survivors, and so entered in the margin of the roll (*Mahony v. Lewis*, 6 Ir. C. L. R. 475). The affidavits in the cause should of course be also entitled in the names of the survivors only (*Larchin v. Buckle*, 1 L. M. & P. 740).

How cause
entitled.

157. In case of the death of a sole plaintiff or sole surviving plaintiff, the legal representative of such plaintiff may (p), by leave of a Court or a Judge, enter a suggestion of the death (q), and that he is such legal representative, and the action shall thereupon proceed; and if such suggestion be made before the trial the truth of the suggestion shall be tried thereat, together with the title of the deceased plaintiff, and such judgment shall follow upon the verdict in favour of or against the person making such suggestion as if he were originally the plaintiff (r).

Proceeding
in case of sole
plaintiff. 15 &
16 Vict. c. 76,
s. 187.

(p) The provisions of this section only extend to cases where the right of action survives (*Flinn v. Perkins*, 32 L. J. Q. B. 10, and *Leitrim v. Maddison*, Ir. R. 3 C. L. 601). It does not extend to proceedings by mandamus where the prosecutor dies (*Reg. v. Limerick & Waterford Railway Co.*, 4 Ir. C. L. R. 249); and in such a case it is necessary to issue a new mandamus. When the public officer of a company suing on its behalf dies a suggestion must be entered (*Barnewall v. Sutherland*, 1 L. M. & P. 159). Where a writ was issued in the name of a dead man, it was held the section did not apply, and that the action could not be continued in the name of the personal representative (*Clay v. Oxford*, L. R. 2 Ex. 54).

Only appli-
cable where
right sur-
vives.

Entering
suggestion.

(g) The Court of Queen's Bench held, in *Mahony v. Lewis*, 6 Ir. C. L. R. 475, that the leave of the Court may be obtained upon an *ex parte* application, and see *M'Mahon v. Ellis*, 12 Ir. C. L. R. 437. As to when and how the suggestion is to be made, see *ante*, section 156, note (n). There is, however, this distinction between entering a suggestion under that and under the present section; that a suggestion under that section may be entered without the leave of the Court, while a suggestion under the present section can only be entered after leave granted for the purpose. In *Burneswall v. Sutherland*, 1 L. M. & P. 159, the action had proceeded to trial in the name of a public officer substituted immediately before the trial in the place of one who had died, and whose death was suggested on the record, and the Court set the verdict aside, as the suggestion had been entered without the authority of the Court, and without an opportunity being given to the defendant to traverse the fact suggested. For the form of a suggestion under the present section see Chitty's Forms, 10th Ed., p. 378, *et seq.*; and Bul. & Lea. Pr. Pl. 2nd Ed., p. 13.

When death
occurs after
verdict.

(r) When the death occurs after verdict or nonsuit and before final judgment, it will in general be unnecessary to enter a suggestion under this section, as judgment may be entered up in favour of the plaintiff under the 159th sect.; or if the signing of the judgment has been delayed in consequence of a point reserved, or from some other cause attributable to the Court or Judge, leave will be given to enter up a judgment *nunc pro tunc*, *ante*, p. 181. If the plaintiff dies after verdict, and it becomes necessary to move for a new trial, an order will not be made until some representative of the deceased plaintiff is before the Court, but the Court will extend the time for moving in order to allow a representative to be brought before it (*Moore v. Browne*, 8 Ir. C. L. R. Ap. 25), and see *post*, s. 159, note (x). The present section of the Act only enables the personal representative of the deceased plaintiff to apply for leave to enter the suggestion. If, however, he does not choose to do so, the defendant may, under section 93 of the C. L. P. Act, 1856 (which see), call upon him to enter the suggestion, and in default of his so doing may enter a suggestion of the death of the plaintiff and of the representative character of the person against whom it is sought to enter the suggestion, and obtain judgment for the costs of the action and the suggestion.

Costs of exe-
cutor where
plaintiff.

It may be desirable to state here the rights and liabilities of a plaintiff executor as to costs. If the judgment be for the plaintiff, he is and always was entitled to costs as in ordinary cases. Previous to 3 & 4 Vict. c. 105, s. 56, if the verdict was for the defendant, or in case of a nonsuit, the plaintiff was not liable to any costs unless the action was such as he might have brought in his personal capacity (Tidd's Pr. 5th Ed., p. 964). But he was liable to the costs of a *non pros.*, or upon a discontinuance, or for not proceeding to trial if he had knowingly brought a wrong action or had been guilty of wilful default, otherwise not (*Id.* 966, *Haris v. Jones*, 1 W. Bl. 451; *Bennett v. Coker*, 4 Burr. 1927); and now by the Act above referred to it is provided, that "in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the Court in which such action is brought, or a Judge of any of the said superior Courts, shall otherwise order, be liable to pay costs to the defendant in case of being nonsuited or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant

shall have judgment for such costs; and they shall be recovered in like manner." The application on behalf of an executor to be exempted from the payment of costs should be promptly made, while the facts are fresh in the recollection of the Judge who tried the case (*Johnstone v. Cottingham*, Jebb & B. 31). As a general rule, an order will not be made under this section depriving a defendant of his costs unless there has been misconduct upon his part which led the plaintiff to proceed with the action, or some other very peculiar ground is laid for the interference of the Court (*Martin v. Johnson*, 2 Cr. & Dix, C. C. 464, Long. & Town. 633, *Godson v. Freeman*, 2 C. M. & R. 585). The discretion given to the Court or Judge applies only in cases where the executor was exempt previous to the Act, and whenever a defendant would have been entitled to costs previous to the Statute, he cannot now be deprived of them by the Court (*Ashton v. Poynter*, 1 C. M. & R. 738). As to the costs of a defendant executor see next section, note (w).

158. In case of the death of a sole defendant or sole surviving defendant, where the action survives (s), the plaintiff may file a suggestion of the death, and that a person named therein is the executor or administrator of the deceased (t), and may thereupon serve such executor or administrator with a copy of the summons and plaint and suggestion, and with a notice, signed by the plaintiff or his attorney, requiring such executor or administrator to file a defence within twelve days after service of the notice, inclusive of the day of such service, and that in default of his so doing the plaintiff may sign judgment against him as such executor or administrator (u); and the same proceedings may be had and taken thereon after such notice as upon a writ against such executor or administrator in respect of the cause for which the action was brought; and in case the plaintiff shall have issued his summons and plaint, but the defendant shall not have pleaded before the death, the new defendant shall plead at the same time to the summons and plaint and suggestion; and in case the defendant shall have pleaded before the death the new defendant shall be at liberty to plead to the suggestion only by way of denial, or such plea as may be appropriate to and rendered necessary by his character of executor or administrator (v), unless, by leave of the Court or a Judge, he should be permitted to plead fresh matter in answer to the summons and plaint, and in case the plaintiff shall recover he shall be entitled to the like judgment in respect of the debt or damages sought to be recovered, and in respect of the costs prior to the suggestion; and he shall be entitled in respect of the costs of the suggestion and subse-

Proceeding upon death of sole or sole surviving defendant. 15 & 17 Vict. c. 76, s. 138.

quent thereto to the same judgment as in an action originally commenced against the executor or administrator (*w*).

Death of sole defendant.

(*s*) This is a new enactment extending only to cases where the right survives. As to what rights survive, see *Broom's Maxims*, 5th Ed. p. 904, *et seq.*

(*t*) As to how and when the suggestion is to be made, see *ante*, ss. 156 & 157, notes (*u*) & (*q*). It may be entered, without the leave of the Court (*M'Mahon v. Ellis*, 12 Ir. C. L. R. 457). For a form of suggestion, see *Chitty's Forms*, 10th Ed., p. 880. The suggestion in question can only be entered by the plaintiff. As to the course to be adopted by the executor of the defendant, in case the plaintiff neglects to enter the suggestion, see sect. 93 of the Common Law Procedure Act; and see, also, sect. 159, *post*.

After defence filed.

(*u*) If the defendant has pleaded before death, it would seem from the above section that judgment by default will go against the executor if he do not appear and file a defence—his non-appearance amounting to a waiver of the defences. See *Day's Common Law Procedure Act*, Ed. p. 118.

Executor's defences.

(*v*) The defences which the executor may file, are such as *ne unques executor, plene administravit*, &c. If the executor admits his representative capacity, and intends to rely on the defences previously filed, it would appear that the proper course for him to adopt is to file a defence admitting his representative capacity, and claiming the benefit of the former defences.

Costs of executor where defendant.

(*w*) Where a plaintiff discontinued after appearance by an administratrix, she was held to be entitled to the *whole* of defendant's costs (*Benge v. Swaine*, 15 C. B. 784). In the case of an ordinary action against an executor, he is entitled to costs as in ordinary cases if he succeeds. If the plaintiff takes a judgment of assets, *quando accederint*, on a plea of *plene administravit*, he is entitled to a judgment for costs, *de bonis testatoris*, but not *de bonis propriis* (*De Tastet v. Andrade*, 1 Chit. Rep. 629); and at the same time the defendant is entitled to the general costs of the cause (*Iggulden v. Terson*, 2 Dowl. 277, 2 Wms. Ex. 6th Ed. p. 1828), but see *Marshall v. Wilder* (in error), 9 B. & C. 655; and see, also, sect. 60, *ante*, p. 57).

In case of a judgment by default against an executor, the plaintiff, it seems, is entitled to a judgment for costs *de bonis propriis* (*Smith v. Tateham*, 2 Ex. 205, 209, per Parke, B.). If an executor pleads a defence which is false within his own knowledge (as *ne unques executor*), he is liable to costs, *de bonis propriis*. If he pleads a plea which is false, but not within his own knowledge (as that the testator did not promise), he is liable to costs *de bonis propriis*, if there be not assets sufficient (*Howard v. Jemmett*, 3 Burr. 1368); and see *ante*, sect. 137, p. 160.

Death between verdict and judgment. 7 Wm. 3, c. 7, s. 2 (Ir.); 17 Ch. 2, c. 8, s. 1, (Eng.); 15 & 16 Vict. c. 76, s. 139.

159. The death of either party between the verdict or nonsuit and the judgment, shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict or nonsuit (*x*).

(*x*) This is a re-enactment of 7 W. 3, c. 7, s. 2 (Ir.); (17 Ch. 2, c. 8, s. 1, Eng.), with the addition that provision is made by the present section for the case of a nonsuit, which was not provided for by the enactments referred to.

Unlike the other provisions of the Statute, it is applicable as well to cases where the right does not survive to the executor as to where it does (*Kramer v. Waymark*, L. R. 1 Ex. 241; *Palmer v. Cohen*, 2 B. & Ad. 966).

Applicable, though right does not survive.

It has been already pointed out in the note to section 155 (which see), that, in cases where the delay in entering up judgment arises from the act of the Court, the Court will allow judgment to be entered up *nunc pro tunc*. In such cases it makes no matter whether two or more terms have elapsed, provided, originally, the judgment could have been entered up in the lifetime of the deceased party, or within two terms after verdict or nonsuit.

Judgment *nunc pro tunc*.

The above section makes a verdict entered up under it equivalent to a judgment entered up during the lifetime of the deceased party, and such judgment will therefore be entitled to the same priority in the administration of the assets as an ordinary judgment recovered against the testator (*Burnett v. Holden*, 1 Lev. 277). If, however, the party dies before the assizes, or sittings, the Statute does not apply, and judgment cannot be entered up under it, and it will be necessary to enter a suggestion under the earlier sections of the Act (*Taylor v. Harris*, 3 B. & P. 549); but the section does extend to the death of a party after the beginning of the assizes (*Anon.*, 1 Salk. 8), or after the first day of the *Nisi Prius* sittings, though before the trial (*Jacobs v. Miniconi*, 7 T. R. 31). It would be different if the trial were in the Consolidated *Nisi Prius* Court. See *Johnson v. Budge*, 3 Dowl. 207; *Taylor v. Harris*, *ubi supra*.

Death of party during assizes.

It is sufficient if the judgment be signed within the two terms, though it be not enrolled (*Helie v. Baker*, 1 Sid. 385), or the costs taxed (*Frewen v. Lethbridge*, 28 L. J. Ex. 243).

Where a verdict is found, with leave reserved to the other party to move, if either party die before the motion can be made, the proceedings may go on if the executor is before the Court, though no suggestion has been entered (*Freeman v. Rosher*, 13 Q. B. 789). The executor must, however, be before the Court (*Solman v. Allen*, 1 M. & G. 96; *Rutledge v. Rutledge*, 4 Ir. C. L. R. 424; *Wallace v. Brown*, 4 Ir. Jur. N. S. 84). In the absence, however, of a legal representative of a deceased plaintiff, his former attorney may be permitted to show cause against a rule obtained by the defendant (*Moore v. Roberts*, 3 C. B. N. S. 844).

Where leave reserved.

Where a successful party dies after verdict, the Court may, at the instance of the other party, grant a motion for a new trial, on the usual grounds, and at the same time impose terms preventing any advantage being taken of the death (*Griffiths v. Williams*, 1 C. & J. 47, in which case the action was for breach of promise of marriage). And in *Kincaen v. Persse*, 9 Ir. C. L. R. Ap. 23, the Court, after the death of a sole defendant, granted a conditional order for a new trial, on a motion made on behalf of the executors.

Granting a new trial after death.

Where a defendant obtained a verdict, and then died, and judgment was entered up within two terms, the Court ordered the taxing master to tax the defendant's costs (*Robinson v. Whelan*, 6 Ir. Jur. O. S. 112).

Costs may be taxed.

In all the cases coming within the above section, the judgment, when entered up, must, of course, be revived before further proceedings are taken.

If the two terms mentioned in the section are suffered to elapse, the only remedy will be to enter a suggestion pursuant to the other sections of the Act, which can only be done where the action survives. However, as before mentioned, this will be unnecessary if leave be granted to enter the judgment *nunc pro tunc*.

Where two terms have elapsed.

Death after
interlocutory
and before
final judg-
ment. 9 Wm.
3, c. 10, s. 6
(Ir.); 8 & 9
Wm. 3; o.
11, s. 6 (Ir.);
15 & 16 Vict.
c. 76, s. 40.

160. If the plaintiff in any action happen to die after an interlocutory judgment and before a final judgment obtained therein, the said action shall not abate by reason thereof, if such action might be originally prosecuted or maintained by the executor or administrator of such plaintiff; and if the defendant die after such interlocutory judgment and before final judgment therein obtained, the said action shall not abate, if such action might be originally prosecuted or maintained against the executor or administrator of such defendant (y); and the plaintiff, or if he be dead after such interlocutory judgment, his executors or administrators, shall and may have a writ of revivor, in the appropriate Form, No. 13. (z) contained in the Schedule B. to this Act, annexed, or to the like effect, against the defendant, if living after such interlocutory judgment, or if he be dead, then against his executors or administrators, to show cause why damages in such action should not be assessed and recovered by him or them; and if such defendant, his executors or administrators, shall not appear and defend at the return of such writ, or shall not show or allege any matter sufficient to arrest the final judgment, a writ of inquiry of damages shall be awarded, or the amount for which final judgment is to be signed shall be referred to the Master, as hereinbefore provided; and upon the return of the writ, or delivery of the order with the amount endorsed thereon to the plaintiff, or his executors or administrators, final judgment shall be given for the said plaintiff, his executors or administrators, prosecuting such writ of revivor against such defendant, his executors or administrators, respectively.

Only applies
where right
survives.

(y) This is substantially a re-enactment of 9 Wm. 3, c. 10, s. 6. Unlike the previous section, it only extends to cases where the right survives, and consequently where, in an action of libel, the defendant died after interlocutory judgment, and after the execution of the writ of inquiry, it was held that the action could not be revived (*Ireland v. Champneys*, 4 Taunt. 884). Neither does the section extend to the case of one of two defendants dying after an interlocutory judgment (*Fort v. Oliver*, 1 M. & S. 242). The action must then be prosecuted against the surviving defendant. Proceedings may be taken, it would appear, although a considerable interval of time has elapsed (*Brown v. Evans*, 2 Tyr. 389).

Form of
writ.

(z) The form is 11 A, and not 13. When the death takes place before the writ of inquiry has been executed, the writ of revivor should call on the defendant, or his executor, to show cause why the damages should not be assessed and recovered; but if the death takes place after the execution of the writ of inquiry, it should call on him to show cause why the damages should not be recovered. When the writ of revivor is issued against the

executors of a deceased defendant, the final judgment should be entered, it would seem, against the executor or administrator, and not against the testator or intestate, 2 Wms. Saun. 72 r. Under the old practice, moreover, when a defendant died, after interlocutory and before final judgment, two *sci. fas.* were necessary, one to revive the action, the other to give the executor an opportunity of pleading any matter appropriate to his character (2 Wms. Saun. 72 r; *Poulett v. Wightman*, 1 Bligh, N. S. 138); and it would appear that two writs of revivor would be also necessary now in a similar case (Ch. Ar. Pr., 12th Ed. p. 1129).

161. The marriage of a female plaintiff (a) or defendant (b) shall not cause the action to abate, but the action may notwithstanding be proceeded with to judgment; and such judgment may be executed against the wife alone, or, by suggestion or writ of revivor pursuant to this Act, judgment may be obtained against the husband and wife, and execution issue thereon; and in case of a judgment for the wife recovered before or after her marriage in an action commenced by her when sole, upon which she would be entitled to execution if she had continued sole, execution may be issued thereupon by the authority of the husband without any writ of revivor or suggestion; and if in any such action the wife shall sue or defend by attorney appointed by her when sole, such attorney shall have authority to continue the action or defence, unless such authority be countermanded by the husband, and the attorney changed according to the practice of the Court.

Marriage not to abate action. 15 & 16 Vict. c. 76, s. 141.

(a) Under the old law, if a female plaintiff married pending the action, the action became abated, and the defendant might plead the marriage in abatement. If he did not so plead, however, execution might be issued without a *scire facias* (*Walker v. Golling*, 11 M. & W. 78). Under the above section, the action may be proceeded with to final judgment, without a suggestion or other proceeding.

When marriage an abatement.

Again, under the old law, if a female plaintiff married *after* judgment, a *scire facias* was necessary to enable the husband to issue execution, 2 Wms. Saund. 72 l. This is now unnecessary by the express words of the section. The husband may, however, have a *scire facias* (see s. 153), if he wish, or may, perhaps, enter a suggestion, or issue a writ of revivor, pursuant to ss. 149 & 151. The advantage of so doing arises from this—that if the husband has not been made a party to the judgment in the lifetime of the wife, he cannot, after the death, take proceedings to have execution without taking out administration (*Betts v. Kimpton*, 2 B. & Ad. 273). In case of a judgment *against* a female plaintiff, execution cannot, of course, be obtained against the husband without a *scire facias*, or suggestion, or writ of revivor.

(b) Under the old law, if a female defendant married pending the action, the proceedings did not abate. If she married after interlocutory, and before

Marriage of female defendant.

final judgment, the proper course was to enter a suggestion, and there was no necessity to issue a *scire facias* (*Coates v. Shields*, 11 Ir. L. R. 216), and the proceedings may now, in all cases, be carried on to final judgment without either a suggestion or other proceeding.

In case of a judgment against a female defendant, when she marries pending the proceedings, execution may be had against her alone, under the words of the above section (and see *Thorpe v. Argles*, 1 D. & L., 831). Or judgment may be revived against the husband and wife by a *scire facias*, or suggestion, or writ of revivor. Generally, the more advantageous course is to revive the judgment, as a *fi. fa.* against a *feme* covert will be useless, and if arrested under a *ca. sa.*, she will be discharged unless she have separate property (*Edwards v. Martin*, 17 Q. B. 693; and see *Poole v. Canning*, L. R. 2 C. P. 241).

If the cause of action, in respect of which the action is brought, is a debt, the husband cannot, as a general rule, be now made responsible (33 & 34 Vict. c. 93, s. 12, *post*, in the Appendix); and under that Act it will also be no longer possible to render the husband liable in respect of a judgment recovered against the wife before marriage, whenever such marriage has taken place after the 9th August, 1870. As to obtaining execution against the husband, on foot of a judgment recovered against the wife when the marriage has taken place before the period, see *Morris v. Coates*, 25 L. T. 176.

Death of wife
after execu-
tion issued.

If after execution awarded against husband and wife, but before it is executed the wife die, the husband is liable to the execution (7 Bac. Abr., Sci. fa. C. 6; *O'Brien v. Ram*, 3 Mod. 186).

If judgment be given for a female defendant, where the husband is not joined, she may, it appears, have execution for the costs in her own name. The husband could not have execution for them in his own name without making himself a party. See *Wortley v. Rayner*, 2 Dowl. 637; and see also *Morris v. Coates*, 25 L. T. 176.

Bankruptcy
and insolv-
ency of
plaintiff,
when not to
abate action.
15 & 16 Vict.
c. 76, s. 142.

162. The bankruptcy or insolvency of the plaintiff in any action which the assignees might maintain for the benefit of the creditors shall not be pleaded in bar to such action, unless the assignees shall decline to continue, and give security for the costs thereof, upon a Judge's order to be obtained for that purpose, within such reasonable time as the Judge may order, but the proceedings may be stayed until such election is made (*c*); and in case the assignees neglect or refuse to continue the action, and give such security within the time limited by the order, the defendant may, within eight days after such neglect or refusal, plead the bankruptcy or insolvency (*d*).

Bankruptcy
of plaintiff.

(*c*) A plea of the plaintiff's bankruptcy or insolvency, in cases where the right of action vests in the assignees, was and still is (subject to the provisions of the above section), a good plea to the further maintenance of the action.

The present section, as may be observed, is confined to cases where the plaintiff becomes bankrupt or insolvent. The position of a plaintiff in case of the bankruptcy or insolvency of a defendant is referred to below.

The section only applies to cases where the bankruptcy or insolvency occurs *pending* the action (*Stanton v. Collier*, 3 E. & B. 274). If they have previously occurred, the defendant may plead them without applying to the Court, and the assignees will have to begin the action *de novo* (*Swann v. Sutton*, 10 A. & E. 623); in which case it was also held that such a defence is good if pleaded *pais darrien continuance*. The section is also apparently framed to meet the case of an action where there is a single plaintiff only. As to when assignees may join with other plaintiffs in suing, see *Sherrington v. Yeates*, 12 M. & W. 855; *Heilbut v. Nevill*, L. R. 5 C. P. 478).

In case the assignees elect to continue the action, they must proceed in the bankrupt's name to judgment; and where a plaintiff obtains an interlocutory judgment, and then becomes a bankrupt, the assignees might even under the old practice mark judgment in the bankrupt's name (*Bibbins v. Mantell*, 2 Wils. 358). When judgment is marked, the assignees must make themselves parties to the judgment by suggestion or revivor, and an execution issued before that is done will be set aside (*Carolyn v. Nolan*, 7 Ir. C. L. R. 114); but see *Waugh v. Austin*, 3 T. R. 437.

Continuing the action by assignees.

The question of what rights of action vest in the assignees is fully discussed in *Drake v. Beckham*, 2 H. L. C. 579, and *Rogers v. Spence*, 12 Cl. & F. 700; see, also, *Crawford v. Cinnamond*, 1r. R. 1 C. L. 325, and *Hunter v. Hunter*, 1r. R. 3 C. L. 138. Where the action is brought by husband and wife, and the husband becomes bankrupt, it would appear to be doubtful whether the action can be continued under the above section. See *Sherrington v. Yeates*, 12 M. & W. 855. When the bankrupt sues as a trustee for others, he will be ordered to give security for costs (*Brady v. Hornsly*, 3 Ir. Jur. O. S. 315).

What rights vest in assignees.

As to the form of the order to be made under the above section, see *M'Namara v. Lynch*, 8 Ir. C. L. R. Ap. 11; *Tierney v. Thomas*, *ib.*; and see, also, *Denston v. Ashton*, L. R. 4 Q. B. 590.

(d) If the assignees decline to continue the action, the defendant may, in case the cause of action has vested in the assignees, plead the bankruptcy or insolvency, either as an original defence or as one *pais darrien continuance*. By the English practice the plaintiff on such a plea being pleaded, may discontinue, and becomes entitled to his costs: Reg. Gen. Pl. Trin. Term, 1853, rr. 22, 23. There is no corresponding rule in this country, and the plaintiff will not under such circumstances be entitled to costs (*ante*, p. 70, *Littleton v. Cross*, 4 B. & C. 117). By pleading such a defence the defendant waives his previous defences, (*ante*, p. 70, *Barber v. Palmer*, 1 Ld. Raym. 693).

Pleading the bankruptcy.

In *Outcherlony v. Gibson*, 6 Sc. N. R. 577, the Court under peculiar circumstances stayed the proceedings after verdict upon payment of the costs incurred by plaintiff up to the time of his insolvency. And where the defendant obtained a judgment as in case of a nonsuit, the Court refused to discharge it, except on a peremptory undertaking and the payment of costs (*Taylor v. Montague*, 2 M. & W. 315). The practice in this country appears to have been that a defendant was not entitled to judgment, as in case of a nonsuit for not going to trial where a plaintiff became an insolvent, but the Court under such circumstances would allow a *stet processus* to be entered without costs, *ante*, p. 118.

Non-prossing plaintiff.

Bankruptcy
of defendant.

If a defendant becomes a bankrupt or insolvent pending an action, and obtains his certificate or discharge, he may plead it in bar to the action either originally or *pais darrein continuance*. In case of insolvency, a defence of the defendant's discharge will not be good if the debt has been omitted from the schedule (*Darley v. M'Donnell*, 1r. R. 3 C. L. 260).

The plaintiff in such an action by proving his demand in bankruptcy waives the action without, however, becoming liable to costs, 20 & 21 Vict. c. 60, s. 262. It is not, however, a good equitable plea in bar to an action, that the defendant has been adjudicated a bankrupt, and that the plaintiff has proved under the bankruptcy (*Spencer v. Demett*, L. R. 1 Ex. 123). The Court will, however, in such a case stay further proceedings (*Leeson v. Outhwaite*, 2 Ir. L. T. 353, and see *ex parte Irving*, Buck, 423).

Cannot non-
pros.

The bankruptcy or insolvency of the defendant is good cause against a rule under the 106th section for not proceeding to trial. And the plaintiff will, under such circumstances be generally allowed to enter a *stet processus* (*Sterne v. Sheane*, 6 Ir. L. R. 25; *Smith v. Davis*, 2 Sc. N. R. 189). The same principle has been acted on in cases of interpleader, where the debtor had become bankrupt (*M'Donnell v. Doherty*, 15 Ir. C. L. R. Ap. 3).

Arrest of
judgment.

Upon motion
in arrest of
judgment or
for judgment
non obstante
verdicto, sug-
gestion of
facts. 15 & 16
Vict. c. 76, s.
143.

With respect to the proceedings upon motions to arrest the judgment and for judgment *non obstante verdicto* (e):

163. No judgment shall be arrested, nor shall judgment be given *non obstante verdicto*, by reason of the non-averment of any alleged material fact or other cause, unless the party insisting on the objection shall satisfy the Court that there has been an omission of some substantial matter of fact whereby the said party may have been prejudiced in the merits of his case, and in such case the party whose pleading is alleged or adjudged to be therein defective may, by leave of the Court, suggest the existence of the omitted fact or facts, or other matter, which, if true, would remedy the alleged defect; and such suggestion may be pleaded to by the opposite party within eight days after notice thereof, or such time as the Court or a Judge may allow; and the proceeding to trial of any issue joined on such suggestion shall be the same as in an ordinary action (f).

Arrest of
judgment.

Judgment
non obstante
verdicto.

What must
be shown.

(e) A motion in arrest of judgment is a motion by an unsuccessful defendant after verdict, that the judgment for the plaintiff be arrested or withheld on the ground that there is some error appearing on the face of the record which vitiates the proceedings. If, on the other hand, the verdict be for the defendant the plaintiff may in certain cases move for judgment *non obstante verdicto*; that is, that judgment be given in his own favour without regard to the verdict obtained by the defendant. Inasmuch as when a motion to arrest a judgment or for judgment *non obstante verdicto* is made, the Court is called upon to enter the judgment of the Court in favour of a party who has failed in an issue of fact selected by or not objected to by

himself it is necessary that it should be clearly established that the party making the application is entitled to the judgment of the Court. Accordingly, in such cases, it is not sufficient merely to show that the finding of the jury has been upon an immaterial issue; it is furthermore necessary to show that it appears from the record that the right of the cause is on the side of the applicant; and if the applicant complains of the non-avertment of any substantial matter of fact the opposite party may, under the above section, suggest such omitted fact. In point of fact as a general rule when motions of the description we are considering are made, it is necessary that the right of the applicant should, so to say, stand confessed upon the record; otherwise the Court will award a repleader. Thus where an application was made to arrest a judgment, and it appeared that the issue upon which the plaintiff had gone to trial and succeeded was an immaterial one, but there were other allegations in the plea upon which a material issue might have been framed, the Court refused to arrest the judgment, upon the ground that there were no materials before it upon which it could act, the finding upon the immaterial issue having decided nothing between the parties, and a repleader was accordingly awarded (*Gordon v. Ellis*, 2 D. & L. 308). In such cases as the one referred to, where the plaintiff succeeds upon the issue upon which he goes to trial he cannot be taken as confessing the truth of the material allegations in the plea or defence; for it is a rule of law that when there are several allegations in a pleading the truth of which is disputed, the opposite party may choose which he pleases and traverse it, and will not, by so doing, be taken as admitting the truth of the other allegations in case he succeeds upon the issue raised (*Gordon v. Ellis*, *ubi supra*, 318). If, however, he fails upon the issue raised he will be taken as indirectly admitting the truth of the other allegations (*Boileau v. Rutlin*, 2 Ex. 665); and a repleader will not accordingly be ever awarded in favour of a party who has made the first fault in pleading, and who fails upon the immaterial issue raised by himself (*Kempe v. Crewes*, 1 Ld. Raym. 167, 170).

Suggesting
omitted fact.

Repleader.

Where, however, it appears, notwithstanding that the plaintiff has succeeded upon the issue raised, that he has got no cause of action, as for instance when the summons and plaint disclose no cause of action, or where by a replication bad in point of law he confesses the truth of a defence which affords a sufficient answer to the previous pleading, judgment will be arrested. So, also, will it be arrested when there is a misjoinder of counts (*Corner v. Shew*, 4 M. & W. 163; *Kitchenman v. Steel*, 3 Ex. 49); and where the plaintiff declared for procuring his apprentice to depart from his service, and for the loss of his service during the whole residue of the term of his apprenticeship, and the jury assessed damages generally, judgment was arrested because it appeared that the term was not expired (*Hambleton v. Vere*, 2 Wms. Saund., 169). Where, however, some of the counts in the summons and plaint are good and some bad, and general damages are given, the Court will not arrest the judgment, but will award a *venire de n vo* (*Ayrey v. Fearnside*, 4 M. & W. 168; *Empson v. Griffin*, 11 A. & E. 186); and see *Jones v. M'Govern*, Ir. R. 1 C. L. 681, referred to *ante*, p. 142, whence it will appear that, in such cases, the plaintiff may, under certain circumstances, be allowed to enter up judgment.

When judgment will be
arrested.

The principles upon which the Court acts when a plaintiff applies for leave to enter up a judgment *non obstante veredicto*, are similar to those acted upon in motions in arrest of judgment. It is necessary that the cause of action should be confessed upon the record, and the plaintiff must therefore show

Judgment
non obstante
veredicto.

What must appear.

that both the issue upon which the defendant has succeeded is immaterial, and, also, that the defendant has, either by the pleading upon which that issue has arisen (*Pim v. Grazebrook*, 2 C. B. 429), or otherwise, confessed the cause of action; and if such confession does not appear, the Court will award a repleader. Thus, a motion for judgment *non obstante veredicto* was refused, when the defendant traversed two immaterial allegations in the declaration upon which he succeeded, leaving unanswered a material allegation; and the principle upon which the decision proceeded was, that the pleas being merely traverses, contained no more than a conditional admission of the allegation not traversed, that was to say, in case the plaintiff proved the allegations traversed (*Rutland v. Bagshaw*, 19 L. J. Q. B. 234); and see *Gwynne v. Burnell*, 6 Bing., N. C. 453; and *Atkinson v. Davies*, 11 M. & W. 236. Where, however, the plea on which the immaterial issue was framed, was one in confession and avoidance; or even though not in confession and avoidance, where there were other pleas upon the record, upon which good issues were framed, and which other pleas were either in confession and avoidance, or by way of traverse, and which the defendant failed in proving, the Court allowed judgment *non obstante veredicto* to be entered (*Couling v. Coxe*, 6 C. B. 703; *Goodburne v. Bowman*, 9 Bing. 532); and see further as to when judgment will be awarded, and in what cases a repleader will be ordered, 2 Wms. Saund., 319 l. *et seq.*

After demurrer.

A motion in arrest of judgment, or for judgment *non obstante veredicto*, cannot be made after judgment upon demurrer (*Edwards v. Blount*, 1 Str. 426, *Cresswell v. Packham*, 6 Taunt. 650; *Willoughby v. Willoughby*, 6 Q. B. 722); but it may be made after a judgment by default (*Edwards v. Blunt*, *ubi supra*). Where a bill of exceptions has been tendered in a cause, a motion in arrest of judgment will not be permitted to be made unless the exceptions are abandoned (*Richardson v. Corcoran*, 7 Ir. C. L. R. 121); neither will a party be allowed to impeach the pleadings of the opposite side upon a motion for a new trial (*Lysaght v. Delacour*, 8 Ir. C. L. R. 453). When the facts which appear upon the record are proved, the Judge at the trial ought not to nonsuit on account of any defect in the pleading; the proper course being to move in arrest of judgment, or for judgment *non obstante* (*Keenan v. Phillips*, 5 Ir. L. R., 440).

Where bill of exceptions.

Motion for a new trial.

How made.

By the 88th and 89th General Orders, 1854, when any party shall seek to move in arrest of judgment, he shall, in the first instance, apply to the Court by motion without notice, and every application in arrest of judgment must be made within the first four days of the term next after the trial, if had either in the sittings after term or at the assizes, or within the first four sitting days after the trial if had in term. As to extending the time for moving, see *Harrison v. Great Northern Railway Co.*, 11 C. B. 42. As to the costs of the parties in case of a motion in arrest of judgment, or for judgment *non obstante veredicto*, see *post*, sects. 164, 165.

Form of rule.

A rule for judgment *non obstante veredicto* ought to be drawn up "upon reading the record" (*Beaty v. Warren*, 4 M. & G. 158).

Entering suggestion.

(f) In order to entitle a party to enter a suggestion under this section, the truth of the facts proposed to be suggested, must be clearly and satisfactorily shown by affidavit (*Manley v. Boycot*, 2 E. & B. 46; *Fisher v. Bridges*, 2 E. & B. 118, 128).

Costs to follow result of issue. 15 & 16 Vict. c. 76, s. 144.

164. If the fact suggested be admitted or found to be true, the party suggesting shall be entitled to the like judgment

as he would have been entitled to if such facts or allegations had been originally stated in the pleading, and proved or admitted at the trial, together with the costs of and occasioned by the suggestion and proceeding thereon; but if such fact or facts be found to be untrue, the opposite party shall be entitled to his costs of and occasioned by the suggestion and proceeding thereon, in addition to any other costs to which he may be entitled (g).

(g) As to the costs in such cases, see the note to the next section.

165. Upon an arrest of judgment, or judgment *non obstante veredicto*, the Court shall adjudge to the party against whom such judgment is given the costs occasioned by the trial of any issues of fact arising out of the pleading for defect of which such judgment is given upon which such party shall have succeeded; and such costs shall be set off against any money or costs adjudged to the opposite party, and execution may issue for the balance, if any (h).

Costs of abortive issues. 15 & 16 Vict. c. 76, s. 146.

(h) Formerly the rule upon a motion in arrest of judgment was, that if the judgment was arrested, both parties bore their own costs (*Cameron v. Reynolds*, 1 Cowp. 403, 407). The plaintiff got no costs, because he did not succeed, and the defendant got none, because the case was not within any of the Statutes giving costs (Gray on Costs, p. 389); and the rule is still the same (*Whaley v. Laing*, 5 H. & N. 480), with the exception above introduced, viz.: that the plaintiff is entitled to the costs occasioned by the trial of the issues arising out of the defective pleading. Upon a motion for judgment *non obstante veredicto*, if the plaintiff succeeded he was not entitled to any costs incurred subsequent to the bad plea, and before signing judgment, inasmuch as such costs were unnecessarily incurred (Gray on Costs, p. 393; *Goodburne v. Bowman*, 2 Dowl. 206). By the above sections, the defendant in such cases is now entitled to the costs occasioned by the trial of the issue of fact arising out of the defective pleading. When the plaintiff fails in his motion, the defendant is entitled to the costs of showing cause as part of his costs in the cause (*Hodgkinson v. Wyatt*, 1 D. & L. 668).

Costs.

With respect to proceedings in error (i):

Error.

166. No judgment in any action shall be reversed or avoided for any error or defect therein, unless the proceedings in error be commenced, or brought and prosecuted with effect, within six years after such judgment signed or entered of record, or within six years after the time when this Act shall have come into operation (j).

Error to be brought within six years. 15 & 16 Vict. c. 76, s. 146.

(i) Error, as has been laid down (Co. Lit. 288, b.), lies whenever a person is aggrieved by an error in the foundation, proceeding, judgment, or execution

When error lies.

of a suit. It is of two kinds—error in law and error in fact. Error in law lies when the error is in the judgment itself. In such cases the error complained of is in matter of law arising from the default of the Court, and the proceedings are taken, not in the Court by which the judgment was given, but in the Court of Exchequer Chamber or House of Lords. Error in fact, on the other hand, is brought in the same Court where the judgment was given, and lies when the error complained of does not arise from any fault in the Court, but for some defect in the execution of process. Com. Dig. Tit. Pleader 3, B. 1.

On what it
lies.

Error can be brought only on a judgment or an award in the nature of judgment (Co. Lit. 288 *b*), and it was, therefore, formerly held that a writ of error could not be brought before judgment was actually given (2 Wms. Saund., 101 *d*). For the same reason it cannot be brought on mere interlocutory orders for the payment of money or costs made by the Court during the progress of the suit, nor upon an order charging stock in which the defendant is interested (*Scott v. Bennett*, Ir. R. 3 C. L. 217; *Newton v. Boodle*, 6 C. B. 532). In the former case (reported in the Court below *sub nom. Bennett v. Scott*, 8 Ir. Jur. N. S. 394) a statement which had been placed upon the record in order that the defendant might bring error, stating, that, although the Judge at the trial had given no certificate, pursuant to s. 97 of the C. L. P. Act 1856, yet the Court had by an order declared the cause to be a fit one to be tried in a superior Court, and followed by an award of full costs, was ordered to be expunged; and the defendant, having afterwards brought error in fact, the Court of Exchequer Chamber held that the order of the Court below was not reviewable. Neither can error be brought for the purpose of reviewing the decision of the Court below upon a question of practice (*Blount v. Evans*, 3 Ir. Jur. N. S. 340). Neither is it competent for a Court of Error to examine the propriety of an amendment of the record made by the Court below being a Court of Record, although the order for the amendment is sent up as part of the record, and was made after writ of error brought (*Mellish v. Richardson*, 9 Bing. 125; S. C. in Dom. Proc. 1 Cl. & F. 224; and cf. 2 Wms. Saund. 101 *d* (n)). As to appealing from the decision of the Court in the case of an issue under the Interpleader Act, see *Green v. Letterkenny Railway Co.*, Ir. R. 3 C. L. 160; *King v. Simmonds*, 1 H. L. Cas. 754.

When it
may be
brought.

The judgment on which error is brought must be one which either *ipso facto* prejudices the civil rights of the party against whom it is given, or upon which execution might be issued, otherwise he is not aggrieved. Thus, as a general rule, error cannot be brought until final judgment is marked, and does not lie upon an interlocutory judgment (*Samuel v. Judin*, 6 East, 333). It is for the same reason necessary that judgment should be given upon the whole record before bringing error (*Tolson v. Kaye*, 7 Sc. N. R. 222). Error may, however, be brought upon an award of a *venire de novo* (*The Trustees of Evans' Charities v. The Bank of Ireland*, 5 H. L. Cas. 389; 19 & 20 Vict. c. 102, s. 49; *M'Mahon v. Ellis*, 10 Ir. C. L. R. 437, 448; *M'Mahon v. Leonard*, 5 H. L. Cas. 931). It may be brought upon a judgment of nonsuit (*Evans v. Swete*, 2 Bing. 326). Where judgment had been given for the plaintiff on demurrer to a replication to one of several pleas, it was held that the defendant might bring error, although the plaintiff had subsequently discontinued the action except as to the costs of the demurrer (*Shepperd v. Sharp*, 1 H. & N. 115).

By section 96 of the present Act no proceeding in error can be brought upon any final judgment marked under that section for a debt or liquidated

demand in money. In *Williams v. Sidmouth Railway Co.*, L. R. 2 Ex. 284, the roll of a judgment obtained against a company was erroneous upon the face of it, and the Court, notwithstanding, allowed a *scire facias* to be issued against a shareholder for the purpose of obtaining execution. As to bringing error for an error in the judgment with respect to costs only, see the 200th G. O. 1854.

By section 122 of the present Act it is provided that no judgment shall be reversed by reason that the venue is misplaced or the trial had in a wrong county or place, nor by reason of any misnomer of any of the jurors who tried the case in name, surname, or addition, so as it appear to the Court to be the same man that was meant to be returned, nor by reason that the plaintiff or defendant being under the age of 21 years did sue or defend by attorney. As to marking a judgment by default against an infant, see *ante*, p. 101, note (u).

As to the course to be adopted when the record is imperfect, in consequence of the omission of anything which should have been inserted, see sect. 176, note (a). And see, as to the time within which error may be brought, note (j) *infra*; as to the parties by whom it may be brought, sect. 167, *post*; and as to the constitution of the Court of Error, 20 & 21 Vict. c. 6, *post*, in the Appendix.

When a party to the record is desirous of bringing error in law the first step to be taken is to lodge the memorandum of error provided by the 170th sect. Formerly the proceedings in error were commenced by suing a writ of error out of the Court of Chancery, which writ (where error in law was brought) was in the nature as well of a *certiorari* to remove a record from an inferior to a superior court as of a commission to the judges of such superior court to examine the record and to affirm it or reverse it according to law. The writ of error has, however, been now abolished in all civil cases, and in its place the memorandum of error substituted. When the memorandum of error is lodged the Master of the Court will give the party lodging it a note of the receipt of it, and this receipt, together with a statement of the grounds of error intended to be argued, must be served on the opposite party or his attorney. As soon as the receipt and statement of the grounds of error are served execution is superseded (sect. 171, *post*); but the *supersedeas* (in the absence of a special order) will only last for four days after the lodgment of the memorandum or signing of the judgment (whichever last happens), unless bail in error be given as provided by the 172nd sect. If bail in error be not given, the party recovering the judgment may issue execution, but the plaintiff in error may notwithstanding continue the proceedings in error. He may, however, under special circumstances, be ordered to give security for costs, note (q), *infra*. Having served the receipt of the memorandum of error and the statement of the grounds intended to be argued, the next step to be taken by the plaintiff in error is to enter the suggestion mentioned in the 173rd section of the Act, or if required, to assign error in the manner therein provided. After the entry of this suggestion the paper books for the Judges should be made up, and the case set down for argument as directed by the 197th and 198th G. Os. 1854. When the case comes on for argument the judgment roll is to be brought into the Court of Error by the Master of the Court, whereupon the Court will give judgment. A suggestion of error in the judgment on a verdict, and an appeal against the rule

Procedure in error.

directing how the verdict shall be entered may be made at the same time and argued together (*Wheelton v. Hardisty*, 8 El. & Bl. 232).

The jurisdiction of the Court of Error in giving judgment, the manner of entering it up, and the further proceedings thereupon, are provided for by sects. 176-178, *q. v.*

As to the procedure when error in fact is alleged, see sect. 179, *post*, and the note thereto.

Incidental proceedings.

As regards the incidental proceedings in cases where error is brought; see as to the course to be adopted when error is brought by one of several parties, sect. 175; as to the course to be adopted when error is brought by or against the representatives of a deceased party, sect. 167; as to discontinuing proceedings, sect. 180; as to *nonprossing* the plaintiff in error, sect. 174; as to confessing error, and consenting to a reversal of the judgment, sect. 181; as to quashing the proceedings, sect. 177; as to the consequences of the death of any of the parties, sects. 182-187; as to the consequences of the marriage of a female plaintiff or defendant, sect. 183; and as to the costs in error, see the 20th General Order, 1854, and the note thereto.

Within what time it may be brought.

(j) The proceedings in error must be brought within six years after judgment, *post*. The signing of the judgment, spoken of in this section, would appear to mean the signing of final judgment, completed by the insertion of taxed costs, and not what is ordinarily understood as the signing of the judgment. See *Blackburn v. Kymer*, 5 Taunt. 672, *sed quaere*.

Previous to the present Act, the time within which error might be brought was twenty years after the judgment was signed, or entered of record (6 Geo. 1, c. 6, s. 3 (Ir.); 10 & 11 Wm. 3, c. 14 (Eng.)). If error be brought after the time prescribed by the present section, the defendant in error should not apply to the Court to quash the proceedings; the proper course to adopt is to call on the plaintiff in error, pursuant to sect. 173, *post*, to assign error, and then plead the bar by lapse of time (see *Higgs v. Evans*, 2 Str. 837).

When a party is too late, under the Statute, to bring error, he cannot apply to the Court, in a summary way, to set aside the judgment (*Graham v. Graham*, 5 Ir. Jur. O. S. 142).

Error may be brought by legal representative of a deceased party.

167 If any person is or shall be entitled to bring error as heir or personal representative of any party, plaintiff or defendant, such person may, by leave of the Court or a Judge, enter a suggestion of the death, and that he is such legal representative, which suggestion shall be embodied in the Memorandum of Error hereinafter mentioned, and shall not be traversable, but shall only be subject to be set aside on application to the Court or a Judge, on motion, if untrue, and the like proceedings in error may thereupon be taken at the suit of such legal representative (k).

Who may bring error.

(k) The parties who may bring error are, 1st, parties to the record; and, accordingly, even a plaintiff may bring error to reverse his own judgment, if he is dissatisfied with it (*Johnson v. Jebb*, 3 Bur. 1772); 2nd, those who are privy to the record, or injured by the judgment, the rule upon the subject being that a writ of error can only be brought by him who would have

had the thing if the erroneous judgment had not been given, 2 Wms. Saund., 46 n. (6). Accordingly, as a general rule, after the death of the parties to the record, their personal representatives may bring error; or in the case of real estate, the heir. An administrator *de bonis non* may, on this principle, bring error to reverse a judgment obtained against a previous executor or administrator (*Curlewis v. Mornington*, 27 L. J. Q. B. 269).

According to the practice formerly prevailing, it was necessary, in cases where there had been a change of parties since the judgment, to sue out a *scire facias ad audiendum errores*, and in England, where there is no section corresponding to the present provision of the Act, it would appear that it is still necessary in such cases to have recourse to such a proceeding (*Curlewis v. Mornington*, *ubi supra*); however, by the above section, the heir or personal representative, if entitled to bring error, may enter the suggestion provided above, and thereupon the like proceedings may be had, as in ordinary cases. Where, however, the proceedings are taken against the personal representative or the heir or assignee of a party, it would appear that a writ of *scire facias* must still be issued (*Greene v. Leclerc*, 17 Ir. C. L. R. 357).

Practice where change of parties.

As to the liability of the heir, or personal representative to costs, see the case of *Parker v. Tootal*, L. R. 1 Ex. 41, referred to in the note to the 201st General Order, 1854.

168. If any person that is, or shall be entitled to bring error as aforesaid is or shall be, at the time of such title accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond the seas (1), then such person shall be at liberty to bring error as aforesaid, so as such party brings or commences and prosecutes the same with effect within six years after coming to or being of full age, *discovert*, of sound memory, or return from beyond the seas; and if the opposite party shall at the time of the judgment signed or entered of record be beyond the seas, then error may be brought, provided the proceedings be commenced and prosecuted with effect within six years after the return of such party from beyond seas.

Proviso for disabilities. 15 & 16 Vict. c. 76, s. 147

(1) By sect. 4 of the present Act, no part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of her Majesty, are to be deemed to be beyond the seas, for the purposes of this Act; and by sect. 10 of the Mercantile Law Amendment Act (19 & 20 Vict. c. 97, *post*, in the Appendix), it would appear that a plaintiff in error is entitled to no further time for the purpose of bringing error by reason of being beyond the seas.

Beyond seas.

169. A writ of error shall not be necessary or used in any action, and the proceeding to error shall be a step in the cause, and shall be taken in manner hereinafter mentioned; but nothing in this Act contained shall invalidate any pro-

Writ of error abolished. 15 & 16 Vict. c. 76, s. 148.

ceedings already taken or to be taken by reason of any Writ of Error issued before the commencement of this Act (*m*).

As to the general nature of the procedure in error, see *ante*, note (*i*).

Error in law
how brought.
15 & 16 Vict.
c. 76, s. 149.

170. Either party alleging error in law may deliver to the Master of the Court a memorandum in writing in the form No. 12. contained in the Schedule B. to this Act annexed, or to the like effect, entitled in the Court and cause, and signed by the party or his attorney, alleging that there is error in law in the record and proceedings, whereupon the Master shall file such memorandum, and deliver to the party lodging the same a note of the receipt thereof; and a copy of such note, together with a statement of the grounds of error intended to be argued, may be served on the opposite party or his attorney (*n*).

Lodgment of
memorandum.

(*n*) From the language of the 172nd section, it follows that the memorandum of error may be lodged before final judgment is marked. When error is brought on a judgment of the Court of Error, returnable to the House of Lords, the memorandum of error is to be lodged with the officer of the Court of Error (*Waterpark v. Fennell*, 2 Ir. Jur. N. S. 182).

By one of
several.

When error is brought by some only of the parties against whom judgment has been given, the note of the receipt of the memorandum should state the names of the persons by whom the proceedings are taken, sect. 175, *post*; and it would appear that in such a case, the memorandum need not purport to be the memorandum of all the parties, but only of those who intend, at all events, to allege error (*Greene v. Leclerc*, 17 Ir. C. L. R. 357, 372).

Error no *super-
sedes* till
service of the
copy of the
note and
ground of
error. 15 &
16 Vict. c. 76,
s. 150.

171. Proceedings in error in law shall be deemed a *super-sedes* of execution from the time of the service of the copy of the note of the receipt by the Master of the memorandum alleging error, together with the statement of the grounds of error intended to be argued, until default in putting in bail, or affirmance of the judgment, or discontinuance of the proceedings in error, or until the proceedings in error shall be otherwise disposed of without a reversal of the judgment (*o*); provided that if the grounds of error shall appear to be frivolous the Court or a Judge upon motion may order execution to issue (*p*).

Supersedeas
of execution.

(*o*) Accordingly, in cases where error in law is alleged, when the note of the receipt by the Master of the memorandum of error, together with the statement of the grounds of error, has been served, execution cannot be issued until default in putting in bail (which should be put in within the

time mentioned in the next section), or until the happening of the other events mentioned in the present section; and if before any such default, as aforesaid, or at any other time while the proceedings in error operate as a *supersedeas*, execution be issued without an order of the Court, or a Judge, such execution may be set aside (*Somerville v. White*, 5 East, 145). Furthermore, if after notice of *supersedeas*, the sheriff proceeds to levy, he will be liable to an action of trespass (*Belshaw v. Marshall*, 4 B. & Ad. 336). If the proceedings in error are taken *after* a writ of execution has issued upon the judgment, and such proceedings become a *supersedeas* of execution before the sheriff has commenced to levy, the writ of execution cannot be executed (*Perkins v. Woolaston*, 1 Salk. 321, unless default be afterwards made in putting in bail (*Lane v. Bacchus*, 2 L. R. 44).

If, however, the writ has been partly executed before the proceedings have operated as a *supersedeas*, the execution must be proceeded with, and the money levied will be ordered to be brought into Court (*Meriton v. Stevens*, Willes, 271). As to discharging a defendant arrested under a *ca. sa.*, see *Alatrop v. Seaton*, 1 Dowl. N. S. 33. When error in fact is brought, the proceedings are so far a *supersedeas*, that execution cannot be issued without the order of the Court, or a Judge (*Semple v. Turner*, 6 M. & W. 152).

(p) If no grounds of error be stated in the copy of the note served, execution may be issued at once by the defendant in error. If, however, any grounds be stated, no matter how frivolous, the defendant in error must obtain the leave of the Court before issuing execution. Where the ground of error alleged was, that no promise to pay interest could be implied from the forbearance of money at the defendant's request, the Court allowed execution to be issued (*Nordenstorn v. Pitt*, 13 M. & W. 723; and see also, *Shelton v. Braithwaite*, 8 M. & W. 256, for another instance of grounds of error held to be frivolous.

Unless, however, the grounds of error are clearly frivolous, the Court cannot interfere (*Gardner v. Williams*, 3 Dowl. 796).

172. Upon any judgment given or to be given in any of the said Superior Courts of Common Law in any personal action or ejectment, execution shall not be stayed or delayed by proceedings in error, or *supersedeas* thereupon, without special order of the Court or a Judge (q), unless the person in whose name such proceedings in error be brought shall, within four clear days after lodging the memorandum alleging error, or after the signing of the judgment, whichever shall last happen, or before execution executed (r), be bound with two, or, by leave of the Court or a Judge, more than two sufficient securities, such as the Court wherein such judgment is or shall be given, or a Judge shall allow of, unto the party for whom any such judgment is or shall be given, by recognizance, to be acknowledged in the same Court (s), in double the sum adjudged to be recovered by the said judgment, except in case of a penalty, in double the sum really due, and double the costs, and in the case of a

Where writ partly executed.

Where grounds of error frivolous.

Bail in error, 15 & 16 Vict. c. 76, s. 151, 2.

plaintiff in double the costs adjudged to be paid to the defendant, and also, except in case of error brought by a defendant in ejectment, and in such case in double the yearly value of the property adjudged to be recovered and double the costs, to prosecute the proceedings in error with effect, and also to satisfy and pay (if the said judgment be affirmed, or the proceedings in error be discontinued by the plaintiff therein,) all and singular the sum or sums of money and costs adjudged or to be adjudged upon the former judgment, and all costs and damages and interest to be awarded on such writ of error, or on any further writ returnable into Parliament, for the delaying of execution, and also the mesne rates of such lands, if any be adjudged in any action to be brought for the same, and give notice thereof to the defendant in error or his attorney (t).

No *supersedeas* without.

(g) In order that the proceedings in error may continue to operate as a *supersedeas* of execution after the expiration of the period prescribed by the last section, bail in error must in all cases be given in the manner provided by this section, unless otherwise specially ordered by the Court or a Judge. At Common Law it was in no case necessary, in order that the proceedings in error might operate as a *supersedeas*, that the plaintiff in error should give bail (Tidd's Pr. 9th ed., p. 1149), and now it is in no case necessary to give it as a condition precedent to bringing error; the purpose for which it is required is, that the proceedings in error may operate as a *supersedeas*. Where, however, the plaintiff in error is resident abroad the Court of Error possesses jurisdiction to stay proceedings until security for the costs of the proceedings in error is given (*Bougleux v. Swayne*, 3 E. & B. 829; *Hill v. Fox*, 3 H. & N. 547). Such an application must be made to the Court of Error, and not to the Court below (*Moore v. Great Southern & Western Railway Co.*, 9 Ir. C. L. R. Ap. 6).

Not necessary at Common Law

Security for costs in error.

Dispensing with bail.

When an application is made to the Court or a Judge to dispense with bail in error, it must be satisfactorily shown, not only that error has been brought *bona fide*, and not merely for the purposes of delay, but also that it is for the furtherance of justice that bail should not be insisted on. Where the Court of Queen's Bench were equally divided and one Judge *pro forma*, and in order that the case might be brought into a Court of Error, withdrew his judgment, the Court allowed error to be brought without bail in error (*Percival v. Dunne*, 8 Ir. C. L. R. Ap. 5); and see further as to dispensing with bail in error (*Williams v. Downman*, 7 Q. B. 112; *Reg. v. Ives*, 11 W. R. 67).

How time reckoned.

(r) The time within which the plaintiff in error should put in bail begins to run from the lodgment of the memorandum of error, or from the signing of the judgment, whichever last happens. The signing of the judgment contemplated by the Statute is the final judgment completed by the insertion of the taxed costs, unless they be relinquished, and not merely the delivery of the summary prescribed by section 124 (*Blackburn v. Kymer*, 5 Taunt. 672; *Power v. Haydn*, Batty, 43). The four days allowed by the section are four clear days, and are therefore to be reckoned exclusive of the day

of signing judgment and of the day on which execution is issued. As a general rule the Court will not enlarge the time for putting in bail except under special circumstances (*Hodgens' Bail*, Hayea, 202; *Dyott v. Lunan*, 1 D. & R. 9; *Handasyde v. Morgan*, 2 Wils. 144). As to issuing or proceeding with execution after service of the copy of the note of the receipt by the Master of the memorandum of error, see *ante*, note (o).

(e) The security must be given by recognizance in the sum provided by the section. It would appear that it is sufficient if the plaintiff in error procures securities to become bound for him, without himself joining in the recognizance (*Dixon v. Dixon*, 2 B. & P. 443). Money cannot as of right be paid into Court in lieu of bail in error (*Collins v. Gwynne*, 2 M. & Sc. 775).

Form of security.

A two-day notice of bail in error must be given before the time for putting in such bail, 195th G. O. 1854; and by the 194th G. O. 1854, no practising attorney, or clerk, or apprentice to a practising attorney, can be bail in error without leave of the Court. Members of a corporation may be bail in error for the corporation (*Henley v. Mayor of Lyme Regis*, 6 Bing. 195). If sham bail be put in, it may be treated as a nullity, and execution, it would seem, may be issued (*Ward v. Levi*, 1 B. & C. 268; *Sutcliffe v. Eldred*, 2 Dowl. 184).

Sham bail.

(f) The plaintiff in error and his sureties bind themselves, as will be observed, to prosecute the proceedings in error with effect, which, in the case of a replevin bond, has been held to mean to carry the suit to a termination successful to the party (*Timmons v. Ogle*, 6 E. & B. 571); and also to satisfy and pay the several sums specified in the above section. As the engagement of the sureties is therefore absolute they will not be discharged by the plaintiff in error being taken on a *ca. sa.* (*Perkins v. Pettit*, 2 B. & P. 440); or by his bankruptcy and certificate (*Southcote v. Braithwaite*, 1 T. R. 624). Where, however, the plaintiff in error died before a reasonable time had elapsed for prosecuting the suit it was held that the sureties were discharged (*Leitrim v. Stewart*, 1r. R. 5 C. L. 27; *Morris v. Matthews*, 2 Q. B. 293).

How bail discharged.

173. The assignment of and joinder in error in law shall not be necessary or used, and instead thereof a suggestion to the effect that error is alleged by the one party and denied by the other may be entered on the judgment roll in the Form No. 13. contained in Schedule B. to this Act annexed, or to the like effect (u); provided that in case the defendant in error intends to rely upon the proceeding in error being barred by lapse of time, or by release of error, or other like matter of fact, he may give four days' written notice to the plaintiff in error, to assign error as heretofore, instead of entering the suggestion, and shall plead thereto within eight days the bar by lapse of time, or release of error, or other like matter of fact, upon which such proceedings may be had as heretofore (v).

Suggestion of joinder in error. 15 & 16 Vict. c. 76, s. 152.

(*) The suggestion in question must be entered within ten days after the service of the receipt of the memorandum of error, s. 174, *post*, q. v.

When to be entered.

Assignment of error.

(v) As to assignment of error see Ch. Ar. Pr. 12th ed., p. 572. When error is assigned, notice of the filing thereof and of other pleadings in error, and with such notice a true copy of the assignment or other pleading, are to be served; and every such assignment or other pleading is to be considered as filed only on the day of such service, 196th G. O. 1854.

If the defendant pleads to the assignment of error any matter of fact upon which issue is joined, the issue will be tried as in an ordinary case. The defendant may, however, carry down the issue for trial without waiting for a default on the part of the plaintiff, and without entering a rule for trying it by *proviso*; Tidd's Pr. 9th ed., p. 1175.

Entry of suggestion to be made by plaintiff in error. 15 & 16 Vict. c. 76, s. 153.

174. The suggestion last aforesaid shall be entered by the plaintiff in error within ten days after the service of the note of the receipt of the memorandum alleging error, or such other time as the Court or a Judge may order (w); and in default thereof, or of assignment of error in cases where an assignment is required, the defendant in error, his executors or administrators, shall be at liberty to sign judgment of *non pros* (x).

Non-prossing plaintiff.

(w) For the course to be adopted where error is brought upon a judgment by some only of the parties against whom it is given, and the other parties decline to join in the proceedings, see the next section.

(x) Execution may be issued by the defendant in error immediately after judgment of *non pros* has been signed. Judgment should, however, be signed before it is issued. The section, as may be observed, provides that the executors or administrators shall be at liberty to sign such judgment; and they may do so, it would appear, though they have not previously been made parties (*St. Katherine's Dock Co. v. Higgs*, 10 Q. B. 652).

When the suggestion has been entered by the plaintiff, and the paper books lodged, he cannot be *non-prossed* for not setting down the case for argument (*Scott v. Midland Great Western Railway Co.*, 6 Ir. Jur. O. S. 1). In such case the defendant may himself set the case down. As to the course to be adopted in case the plaintiff neglects to make up the paper books, see *Doolan v. Doolan*, 7 Ir. Jur. N. S. 34, and the 197th G. O. 1854.

Error by one of several persons. 15 & 16 Vict. c. 76, s. 154.

175. In case error be brought upon a judgment given against several persons, and one or some only shall proceed in error, the note of the receipt of such memorandum shall state the names of the persons by whom the proceedings are taken; and in case the other persons against whom judgment has been given decline to join in the proceedings in error, the same may be continued, and the suggestion last aforesaid entered, stating the persons by whom the proceedings are brought, without any summons and severance; or if such other persons elect to join, then the suggestion shall state them to be and they shall be deemed as plaintiffs in error, although not mentioned as such in the previous proceedings (y).

(y) According to the former practice if a judgment was given against several, any one of them might have brought error. The writ of error should, however, in such a case, have been issued in the names of all, and if in the name of one or some only, it would be quashed by the Court (*Laroche v. Wasbrough*, 2 T. R. 737). If, after the writ of error had been brought in the names of all, some of the parties refused to come in and join in the proceedings, they must have been summoned and severed; and the summons and severance should have been entered upon the record. After the severance of the parties refusing to join, the other parties might have proceeded with the writ of error alone.

Former practice.

According to the present practice the proceedings are commenced by the lodgment of the memorandum of error; and when the proceedings are taken by some only of the parties against whom the judgment is given, the memorandum, although entitled in the cause, should be in the names of, and signed by those only actually bringing error (*Green v. Leclerc*, 17 Ir. C. L. R. 357, 372). The practice, however, does not appear to be as yet fully settled. After the lodgment of the memorandum of error the parties who have not signed the memorandum of error must, it would seem, be served with notice of the proceedings, so as to have the option of joining in the proceedings if they choose (*Green v. Leclerc*, *ubi supra*). In that case the Court intimated their opinion to be that, in the case of error in fact, the proceedings by summons and severance have not been abolished by the present statute, and that even if abolished the record must in some way, by suggestion or otherwise, show that the other defendants declined to join in the proceeding, or had an opportunity of electing to do so.

Present practice.

176. Upon such suggestion of error alleged and denied being entered, the cause may be set down for argument in the Court of Error in the manner heretofore used (z); and the judgment roll shall, without any writ or return, be brought by the Master into the Court of Error in the Exchequer Chamber, before the Judges of the said Court, on the day of its sitting, at such time as the Judges shall appoint, either in term or in vacation (a); and the Court of Error shall and may thereupon review the proceedings, and give judgment as they shall be advised thereon; and such proceedings and judgment as altered or affirmed shall be entered on the original record; and such further proceedings as may be necessary thereon shall be awarded by the Court in which the original judgment was given (b): provided, however, that in case of error to the High Court of Parliament, a transcript of the record shall be prepared and forwarded in the manner heretofore used (c).

Judgment roll to be brought into Court of Error: 15 & 16 Vict. c. 76, s. 14b.

(z) See the 197 O. O., 1854.

(a) Previous to the present Act, the original record was not brought into the Court of Error, but a transcript of it was made out and returned to the Court.

Former practice.

Alleging
diminution.

When the record is imperfect, in consequence of the omission of anything which should have been inserted, the plaintiff should allege diminution. Previous to the present Act, the plaintiff in error in such a case should in the first instance issue his writ of error, and then obtain a *certiorari* to return the record; and on return thereof allege diminution, if the part sought to be inserted were omitted. Accordingly, where a trial was had, and a bill of exceptions taken to the charge of the Judge—which exceptions were allowed, and a *venire de novo* awarded, and a second trial had, and a verdict found in favour of the exceptants—it was held, upon a writ of error having been issued, that the plaintiff in error was entitled to a *certiorari* to have these matters returned as part of the record (*Evans' Charities v. The Bank of Pre-lund*, 1 Ir. C. L. R. 394, 396; 3 Ir. C. L. R. 280; 5 H. L. Cas. 389). In that case (1 Ir. C. L. R. 394), an application was in the first instance made to the Court below to insert the omitted parts, which application was refused, the Court stating that the proper course was to allege diminution. As to suggesting the matter omitted, see *Bennett v. Scott*, 8 Ir. Jur. N. S. 394, 10 Ir. Jur. N. S. 31, S. C. in Ex. Ch. *sub nom. Scott v. Bennett*, 1r. R., 3 C. L. 217; and see further as to alleging diminution, 2 Wms. Saund., 101 v., Bacon's Abr. Tit. Error E.

A Court of Error will not inquire into the propriety of amendments made by the Court below, even though the amendments were made after error brought (*Scales v. Cheese*, 12 M. & W. 685), and see *Ward v. M'Kelvey*, 7 Ir. Jur. N. S. 409.

Argument.

(b) As to the mode of proceeding upon the argument of the case, see the 197th and 198th G. Os. 1854, and the notes thereto; and as to the nature of the judgment which the Court may give, see sect. 178, *post*.

How judg-
ment entered.

What a Court of Error does on error duly brought has been thus described: It takes possession of the roll from the Court below; it places upon the roll as its own judgment that which is the true judgment of the law, and then returns the roll to the Court below with this new judgment placed upon it. Upon error to the House of Lords, the judgment of the House is entered upon the transcript of the record, which is then returned to the Court below, and the judgment so entered is copied upon the original roll (*M'Mahon v. Leonard*, 10 Ir. C. L. R. 444, 456, per Christian J.). When, however, the judgment of the Court of Error has been entered upon the roll, the further proceedings are to be awarded by the Court in which the original judgment was given. The Court of Error has accordingly no jurisdiction upon reversing a judgment to award restitution, but will remit the record to the Court below to be dealt with there (*M'Andrew v. The Beet Sugar Co.*, 7 Ir. C. L. R. 622). As to the manner of restitution see Ch. Ar. Pr. 12th ed., p. 582.

Error to
House of
Lords.

(c) Upon error to the House of Lords, the memoranda of error prescribed by sect. 170, *ante*, are to be lodged with the officer of the Court of Error (*Waterpark v. Fennell*, 2 Ir. Jur. N. S. 182). In such cases, moreover, the original transcript, as also the judgment of the Court of Exchequer Chamber, should be lodged with the clerk of the errors (*Rogers v. Dejoncourt*, Bl. D. & O. 91).

Jurisdiction
of Courts of
Error. 15 &
16 Vict. c. 76,
s. 166.

177. Courts of Error shall have power to quash the proceedings in error in all cases in which error does not lie (*d*), or where they are taken against good faith (*e*), or in any case in which proceedings in error might heretofore have been

quashed by such Courts (*f*); and such Courts shall in all respects have such jurisdiction over the proceedings as over the proceedings in error commenced by writ of error, and shall be enabled to give the like order for payment of interest for delay of execution in giving any judgment of affirmance (*g*).

(*d*) The above section provides that the Court of Error may quash the proceedings when error does not lie. The cases provided for are cases where it appears from the record itself that error does not lie, as for instance where error is brought upon an interlocutory order or the like—*ante*, p. 196, but in cases where error does not lie, in consequence of matter *dehors* the record, except where the proceedings are taken against good faith, the Court will not quash the proceedings (*Howell v. London Dock Co.*, 6 Jur. N. S. 676). Neither will the proceedings be quashed where the only ground upon which it is sought to quash them is that the judgment is incorrect. In such a case the plaintiff in error is entitled to have the question decided in the ordinary manner.

Quashing proceedings.

Previous to the present Act there were three ways in which the proceedings might be quashed. The defendant might in the first place, apply to the Court of Chancery out of which the writ issued, and which in the exercise of its inherent power over its own proceedings, might quash a writ which should not have been issued; or he might apply to the Court of Error where the writ was made returnable, which, however, could only quash the writ where there was a defect apparent upon the face of it, or where the record did not correspond with it (*Garrard v. Tuck*, 8 C. B. 258, 268, per Parke, B.); or he might apply to the Court below, to which the writ was directed. It was however, extremely doubtful whether the Court below had any power to quash the writ (*Lloyd v. Scutt*, 1 Dougl. 350, Tidd's Pr., 9th ed., p. 1162, and see *Doolan v. Doolan*, 7 Ir. Jur. N. S. 34): and it would appear, that the only power it could exercise in such a case, was to allow execution to issue. There are, however, cases to be met with, in which the Court below quashed the proceedings, see *Bennett v. Morris*, 2 Law Rec. O. S. 35. Assuming that, according to the former practice, the Court below had no power to quash the proceedings, it would follow, that such an application should now in all cases be made to the Court of Error.

Where application to be made.

(*e*) The proceedings will be quashed if brought contrary to agreement, even though the proceedings are plainly erroneous upon the face of them (*Cumden v. Edie*, 1 H. Bl. 21; *Executors of Wright v. Nutt*, 1 T. R. 388; *Brown v. Granville*, 4 M. & Scott, 333); or if time to pay was given upon a promise to settle (*Cuter v. West*, 2 T. R. 183), or where the action is brought to try a particular question, and the plaintiff brings error for some matter not affecting the question agreed to be raised (*Garrard v. Tuck*, 8 C. B. 254, 258, 270).

For bad faith.

(*f*) The other cases in which proceedings in error might have been quashed, were where the record did not correspond with the writ, or where it was defective upon the face of it, and see further, Tidd's Pr., 9th ed., p. 1162.

For defect in writ.

The order quashing the proceedings is matter of record examinable upon error in the House of Lords (*King v. Simmonds*, 1 H. L. Cas. 754).

As a general rule, costs are payable on an order quashing the proceedings. Costs.

By the 6th Anne, c. 10, s. 22 (Ir.); 4 Anne, c. 16, s. 25 (Eng.), it is enacted, that upon the quashing of any writ of error for variance from the original record or other defect, the defendants in error shall be entitled to their costs, and by the above section, it is provided that the Court of Error shall have the same jurisdiction over the proceedings in error as if they had been commenced by writ of error. If, however, the proceedings are defective in consequence of the defendant's acts, no costs will be given, or he may even be ordered to pay them (*Gould v. Coulthurst*, 1 Str. 139; *Rejindoz v. Randolph*, 2 Str. 834).

Interest.

(g) By 3 & 4 Vict. c. 105, s. 55, *post*, in the Appendix, the defendant in error, in case he succeeds, is entitled to interest on the amount of the judgment for such time as execution is delayed. As to which court the order for interest is to be made by, see *Hooper v. Lane*, 6 H. L. Cas. 443, 555.

Court of Error to have like powers with Court below. 16 & 16 Vict. c. 76, s. 157.

178. Courts of Error shall in all cases have power to give such judgment and award such process of repleader and writ of inquiry as the Court from which error is brought ought to have done, without regard to the party alleging error (h).

Power of Court of Error in giving judgment.

(h) The present section enlarges considerably the powers of the Court of Error as regards proceedings taken there. Formerly the rule was, that where a writ of error was brought by a defendant to reverse a judgment pronounced against him, the Court could only affirm or reverse the judgment *in toto*; while, if the writ of error was brought by the plaintiff, the Court would not only reverse the judgment if they considered it erroneous, but they would pronounce such judgment as the Court below ought to have given (*The Queen v. Houston*, 4 Ir. L. R. 174, 176, per Burton, J.). In point of fact, the Court of Error could give no judgment *against* the party suing out a writ of error after reversing an erroneous judgment against him, although they might give one in his favour (*Pollitt v. Forrest*, 11 Q. B. 949, 973, per Parke, B.). Thus, on reversing a judgment had for the plaintiff below, it might give the defendant (the plaintiff in error), judgment for costs (*Gildart v. Gladstone*, 12 East, 668). Furthermore, the judgment was deemed one entire thing which could not be reversed in part and affirmed in part (2 Wms. Saund., 101 bb.), and therefore, if in an action against several, one judgment was given against all, and upon error it was held that the judgment was erroneous as to one, it must have been reversed as against all (Ro. Abr. 776, pl. 9; *Greene v. Leclerc*, Ir. R. 1 C. L. 457). However, by the present section, the Court of Error is empowered to give such judgment as the Court below ought to have given, and the judgment is entered upon the original record, see *M'Mahon v. Leonard*, 10 Ir. C. L. R. 444, 456. Thus, on reversing a judgment of the Court below, where error is brought by the defendant, it will award him the costs of the proceedings below (*Gildart v. Gladstone*, 12 East, 668); and as the whole record is before the Court they may inquire into the whole of the judgment and give judgment against the plaintiff in error upon a part of the record as to which no error is alleged, see *Kernot v. Pittis*, 23 L. J. Q. B. 33, 35.

By the present section, moreover, the Court of Error is empowered to award a repleader or writ of inquiry. It may also award a *venire de novo* (*Grunt v. Astle*, 2 Dougl. 722); on which award error may at once be brought to the House of Lords (*M'Mahon v. Leonard*, 10 Ir. C. L. R. 444, 448. The

further proceedings on the judgment of the Court such as awarding restitution, &c., are, however, to be awarded by the Court in which the original judgment was given, s. 176, *ante*, note (b).

As to entering up a judgment of reversal at the instance of the defendant in error, see *post*, s. 181, note (j).

179. Either party alleging error in fact may deliver to the Master of the Court a memorandum in writing in the form No. 14. contained in the Schedule B. to this Act annexed, or to the like effect, entitled in the Court and cause, and signed by the party or his attorney, alleging that there is error in fact in the proceedings, together with an affidavit of the matter of fact in which the alleged error consists, whereupon the Master shall file such memorandum and affidavit, and deliver to the party lodging the same a note of the receipt thereof; and a copy of such note and affidavit may be served on the opposite party or his attorney; and such service shall have the same effect, and the same proceedings may be had thereafter, as heretofore had after the service of the rule for allowance of a writ of error in fact (i).

Proceedings
in error in
fact. 5 & 16
Vict. c. 76,
s. 158.

(i) As to when error in fact may be brought, see *ante*, p. 196.

Error in fact.

Error in fact must be brought in the Court in which judgment has been given. It has, however, been held in England that error in fact lies in the Queen's Bench on a judgment of the Common Pleas (*Castledine v. Mundy*, 4 B. & Ad. 90, 97).

The first step to be taken by a party alleging error in fact is to lodge the memorandum of error and affidavit prescribed by the section. When lodged, a copy of the note of the Master's receipt and of the affidavit are to be served on the opposite party or his attorney. After service the next step is to assign error, as to which see the 196th G. O. 1854. For forms of assignment of error, see Chitty's Forms, 10th Ed., p. 306; and see *Green v. Leclerc*, 17 Ir. C. L. R. 357, for the form of a *scire facias ad audiendum errores*. Only one error in fact can be assigned. When error is assigned the defendant should plead to the assignment. As to how the defendant should plead see Ch. Ar. Pr. 12th Ed., p. 588. When the defendant makes default in pleading to an assignment of error, the plaintiff is entitled to an absolute order for a judgment of reversal (*Arding v. Holmer*, 1 H. & N. 278).

How
brought.

When the pleadings are concluded issue in fact or in law as the case may be, should be joined between the parties, and thereupon the proceedings with respect to the trial of such issue are the same as in the case of any ordinary issue in fact or in law (199th G. O. 1854), except that both parties being *actors* either may make up the abstract and serve notice of trial. If the defendant succeeds the judgment of the Court is that the former judgment be affirmed; if, on the other hand, the plaintiff succeeds, the judgment is that "the judgment aforesaid be recalled."

Trial of issue.

Where brought by representative.

As regards the incidental proceedings when error in fact is brought, there appears to be considerable doubt as to the practice. When error is brought by the heir or personal representative of a deceased party, s. 167, *ante*, applies. If brought against the heir or personal representative, it would appear that a writ of *scire facias ad audiendum errores* should in the first instance be issued (*Green v. Leclerc*, 17 Ir. C. L. R. 357, *Curlewis v. Mornington*, 27 L. J. Q. B. 269).

By one of several.

As to the proceedings to be adopted when error is brought by one or some only of the parties against whom judgment is given, see note (y), *supra*, and *Green v. Leclerc*, *ubi supra*. Bringing error in fact does not, strictly speaking, operate as a *supersedeas*; but after it is brought execution cannot be issued without the leave of the Court (*Simple v. Turner*, 6 M. & W. 152). It may, however be doubted whether under the 172nd section of the Act the plaintiff should not put in bail within the time there prescribed.

Non-prossing.

As to *non-prossing* the plaintiff, there does not appear to be any provision in the Act, as the 174th section is inapplicable; and according to the practice prevailing before the Act, (which is left unaffected), the plaintiff might be ordered to assign error within a limited time, and in default a non-pros might be entered (*McEncrow v. English*, 2 Ridg. P. C. 112). It was not necessary for the defendant to serve the rules to plead before marking judgment (*Poole v. Cassidy*, Bl. D. & O. 229).

Death of parties.

If the proceedings become defective in consequence of the death of the parties, transmission of interest, &c., it may be questioned, having regard to the language of the 182nd section, whether the proceedings can be continued in the manner provided by that and the following sections. If they cannot, the proceedings in error become abated in the same cases as before the Act, see s. 182, *post*, note (k).

If the proceedings in error in fact are erroneous in consequence of a wrong decision in point of law, error in law may be brought upon the judgment of the Court in the same cases that it might be brought in an ordinary cause (*Irwin v. Grey*, L. R. 1 C. P. 171; S. C. in Dom. Proc. L. R. 2 H. L. 20); and in such cases the Court of Error will give judgment of reversal if there is error in law apparent upon face of the record, though error in fact only is assigned (*Castledine v. Munday*, 4 B. & Ad. 90).

Plaintiff may discontinue proceedings in error. 15 & 16 Vict. c. 76, s. 159.

180. The plaintiff in error, whether in fact or law, shall be at liberty to discontinue his proceedings by giving to the defendant in error a notice, headed in the Court and cause, signed by the plaintiff in error or his attorney, stating that he discontinues such proceedings, and thereupon the defendant in error may sign judgment for the costs of and occasioned by the proceedings in error, and may proceed upon the judgment on which the error was brought.

Defendant may confess error and consent to reversal of judgment. 15 & 16 Vict. c. 76 s. 160.

181. The defendant in error, whether in fact or law, shall be at liberty to confess error, and consent to the reversal of the judgment, by giving to the plaintiff in error a notice, headed in the Court and cause, signed by the defendant in error or his attorney, stating that he confesses the error, and consents to the reversal of the judgment, and thereupon the

plaintiff in error shall, on an affidavit of the service of such notice, be entitled to and may forthwith sign a judgment of reversal (j).

(j) When in order to reverse a judgment in trespass and assault, allowed to go by default against an infant, error in fact was assigned on the ground of the parliamentary appearance having been entered by attorney instead of guardian, and the error was confessed; the defendant in error was allowed to enter up judgment against himself in order to enable him to bring a new action) *Leonard v. Annesley*, Smyth, 96; and see *Jackson v. Marshall*, 24 L. J. Q. B. 143. A defendant may bring error on a judgment for the plaintiff on demurrer to a replication to one of several pleas; though the plaintiff has subsequently discontinued the action except as to the costs of the demurrer (*Shepherd v. Sharp*, 1 H. & N. 115).

Confessing error.

182. The death of a plaintiff in error after service of the note of the receipt of the memorandum alleging error, with a statement of the grounds of error, shall not cause the proceedings to abate, but they may be continued as herein-after mentioned (k).

Death of plaintiff in error no abatement. 15 & 16 Vict. c. 76, s. 161.

(k) Previous to the Act the death of the plaintiff in error caused the proceedings to abate only in case the death occurred before error was assigned, 2 Wms. Saund. 101 t; and pursuant to the 9th Wm. 3, c. 10, s. 17 (Ir.), 8 & 9 Wm. 3, c. 11, s. 7 (Eng.), no abatement took place in consequence of the death of one of several plaintiffs (*Clarke v. Rippon*, 1 B. & Ald. 586). If the sole plaintiff in error died after error was assigned, the defendant should proceed to have the judgment affirmed, and should then revive the judgment in the ordinary way by *scire facias*, 2 Wms. Saund. 101 t.

Death of plaintiff.

Under the present Act, as will be seen, the proceedings in no case become abated by the death of the plaintiff in error. If the party die before the note of the receipt is served his representative will have to lodge a fresh memorandum in the form prescribed by s. 167, *ante*.

As to the consequences of the death of a defendant in error, see s. 185, *post*.

183. In case of the death of one of several plaintiffs in error, a suggestion may be made of the death, which suggestion shall not be traversable, but shall only be subject to be set aside if untrue, and the proceedings may be thereupon continued at the suit of and against the surviving plaintiff in error, as if he were the sole plaintiff.

Death of one of several plaintiffs in error. 15 & 16 Vict. c. 76, s. 162.

184. In case of the death of a sole plaintiff or of all the plaintiffs in error, the legal representative of such plaintiff or of the surviving plaintiff may, by leave of the Court or a Judge, enter a suggestion of the death, and that he is such legal representative, which suggestion shall not be travers-

Death of sole plaintiff, or of all the plaintiffs in error. 15 & 16 Vict. c. 76, s. 163.

able, but shall only be subject to be set aside on application to the Court or a Judge on motion, if untrue, and the proceedings may thereupon be continued at the suit of and against such legal representative of the plaintiff in error; and if no such suggestion shall be made, the defendant in error may proceed to an affirmance of the judgment according to the practice of the Court, or take such other proceedings thereupon as he may be entitled to (l).

How proceedings continued after death of plaintiff.

(l) Previous to the Act as stated above, note (k), if the plaintiff in error died *before* error was assigned, the proceedings abated and the defendant should revive the judgment by *scire facias* before issuing execution; if the death took place *after* error was assigned the defendant in error should proceed to an affirmance of the judgment, which should then be revived in the usual manner before issuing execution; and it would appear from the language of the above section that a similar practice is to be followed now, and that the defendant need not proceed to have the judgment affirmed except when the death takes place after the entry of the suggestion prescribed by section 173, or assignment of error if required.

In *Haygarth v. Wilkinson*, 12 Q. B. 851, the plaintiff having died, security for costs was, under the circumstances of the case, ordered to be given.

Death of defendant in error no abatement. 15 & 16 Vict. c. 76, s. 164.

185. The death of a defendant in error shall not cause the proceedings to abate, but they may be continued as herein-after mentioned (m).

Death of defendant.

(m) Previous to the Act, the death of the defendant in error did not cause the proceedings to abate (2 Wms. Saund. 101 t). If the death took place before joinder in error, the plaintiff, on the one hand, might issue a *scire facias ad audiendum errores* against the representatives, while they, on the other hand, might have a *scire facias quare executionem non* to compel the plaintiff to assign error, and after affirmance they might sue out a *scire facias* to revive the judgment; or, if the death took place after affirmance, the representatives might revive the judgment in the ordinary manner. It will be observed that, while the present Act provides the plaintiff with a means of continuing the proceedings against the representatives of a sole or surviving defendant in error, it does not make any provision for enabling them to have the judgment affirmed. They may, accordingly, continue the proceedings in the same manner as before the Act, and after affirmance they must revive the judgment previous to issuing execution. They may also *non-pros* the plaintiff without previously making themselves parties (sect. 174, ante, *St. Katharine Dock Co. v. Higgs*, 10 Q. B. 652 n.).

How proceedings continued.

Where, on the death of the defendant in error, after joinder in error, his personal representative applied for leave to enter a suggestion of the death upon the roll, the Court refused the application (*Bentley v. Clarke*, 3 Law Rec. N. S. 121). As to entering such a suggestion upon the death of one of several defendants, see the next section.

186. In case of the death of one of several defendants in error, a suggestion may be made of the death, which suggestion shall not be traversable, but only be subject to be set aside if untrue, and the proceedings may be continued against the surviving defendant.

Proceedings upon death of one of several defendants in error. 15 & 16 Vict. c. 76, s. 165.

187. In case of the death of a sole defendant, or of all the defendants in error, the plaintiff in error may proceed, upon giving ten days' notice of the proceedings in error, and of his intention to continue the same, to the representatives of the deceased defendants, or, if no such notice can be given, then, by leave of the Court or a Judge, upon giving such notice to the parties interested as he or they may direct (n).

Proceedings upon death of sole defendant, or of all the defendants in error. 15 & 16 Vict. c. 76, s. 166.

(n) See *ante*, sect. 185, note (m).

188. The marriage of a female plaintiff or defendant in error shall not abate the proceedings in error, but the same may be continued in like manner, as hereinbefore provided, with reference to the continuance of an action after marriage (o).

Marriage not to abate proceedings in error. 15 & 16 Vict. c. 76, s. 167.

(o) See sect. 161, *ante*. Previous to the Act, the marriage of a female plaintiff in error caused the writ of error to abate (*Jenkins v. Bates*, 2 Str. 1015).

Marriage.

Bankruptcy does not cause the proceedings to abate (*Kretchman v. Beyer*, 1 T. R. 463).

Bankruptcy.

189. In case any action, suit, or proceeding in any of the Superior Courts of Law or in a Court of Equity shall be commenced, sued, or prosecuted in disobedience of any writ of injunction, rule or order of the Court of Chancery or of any of the Superior Courts of Law, upon production of such writ of injunction, rule or order, to the Court in which such action, suit, or proceeding shall be commenced, prosecuted, or taken, or any Judge thereof, the said Court or a Judge shall stay all further proceedings contrary to such injunction, rule or order, and thenceforth all further and subsequent proceedings shall be utterly null and void: Provided always, that nothing herein contained shall be held to vary or abridge the liability of any person commencing, suing, or prosecuting such action, suit, or proceeding, contrary to such injunction, rule, or order aforesaid, to any attachment, punishment, or other proceeding to which such person shall or may be liable in case of contempt of the Court of Chancery, or Superior

Injunctions to have a specific operation. 15 & 16 Vict. c. 76, s. 226.

Court of Law aforesaid, in regard to the commencing, suing, or prosecuting such action, suit, or proceeding (p).

Effect of injunction.

(p) Previous to the Act, an injunction, or decree of the Court of Chancery, was attended with no specific effect upon the proceedings, which might be continued, notwithstanding the injunction (*Horne v. Tooke*, 2 Dowl. 776); and the only way the party aggrieved could enforce the injunction was by procuring an attachment or other process to be issued out of the Court of Chancery. The Court of law is, however, now bound specifically to enforce an injunction, rule or order of the Court of Chancery, or one of the Superior Courts, by staying further proceedings, and an order will be made under this section when an order has been made by the Court of Chancery for an injunction, although the writ has not been actually issued (*Cobbett v. Ludlam*, 25 L. J. Ex. 25). Unless, however, the Court of Chancery has ordered an injunction to issue, the proceedings will not be stayed merely because proceedings are pending in that Court (*Pearse v. Robins*, 26 L. J. Ex. 183); and it should be remembered that the section only applies when the proceedings are taken in one of the Superior Courts, and therefore does not apply when the proceedings are taken elsewhere, as, for instance, in the Court of Admiralty (*Milburn v. The London & S. W. Ry. Co.*, L. R. 6 Ex. 4). Proceedings will not be stayed, because proceedings are pending between the same parties in a foreign Court (*Cox v. Mitchell*, 7 C. B. N. S. 55). If, however, proceedings be vexatiously taken in another Court by the plaintiff, the Court may, in the exercise of its equitable jurisdiction, stay the action (*Frith v. Guppy*, L. R. 2 C. P. 32). As to ruling a plaintiff, who proceeds both at law and in equity, for not proceeding to trial within the period of time prescribed by the 106th section of the Act, see *ante*, p. 119.

Giving consent for judgment.

By 25 Geo. 3, c. 51, s. 1 (1r.), it is enacted, "that in all injunctions which shall issue out of any Court of Equity, to stay any defendant from proceeding at law (except upon good and sufficient equity, confessed in the answer of such defendant), there shall be inserted a proviso that such defendant shall be at liberty to call for a plea, and to proceed to trial thereon, and for want of a plea to enter up judgment, but execution to be stayed."

Where an action is brought in contravention of a Judge's order made in another matter, the Court will, of course, stay the proceedings (*Kelly v. Falls*, 1 Ir. L. T. 702).

General Matters.

Pleadings dated of time of pleading. 15 & 16 Vict. c. 76, s. 54.

With respect to general matters connected with the action: 190. Every defence and demurrer and other pleading shall be entitled of the proper Court, and of the day of the month and the year when the same was pleaded, and shall be entered on the abstract for Nisi Prius, and on the judgment book or roll under the date of the day of the month and year when the same respectively took place (q).

Entitling pleadings.

(q) The pleading should be correctly entitled upon the face of it, and if it be incorrectly entitled or dated it may be set aside as irregular (*Watt v. Cooper*, 1 Ir. C. L. R. 85; *Ripling v. Watts*, 4 Dowl. 290). If incorrectly entitled it will not, however, be void (*Hodson v. Parnell*, 4 M. & W. 373).

A summons and plaint and defence, or other pleading, must be dated as of the day upon which it is issued or filed, and the Court cannot allow it to be issued or pleaded *nunc pro tunc*, even to save the Statute of Limitations (*Clarke v. Smith*, 2 H. & N. 753), unless the writ or pleading has not been issued or filed in consequence of a default upon the part of the officer of the Court (*Nazer v. Wade*, 1 B. & S. 728; *Evans v. Jones*, 2 B. & S. 45).

When a writ or pleading is amended, the amended writ or pleading bears the same date as the original writ or pleading (*Coombs v. Bristol and Exeter Railway Co.*, 1 F. & F. 206; *Short v. Simpson*, L. R. 1 C. P. 248, 250 n., in which case the amendment consisted in the addition of a new plea); but see *Knight v. Warren*, 7 Dowl. 663.

Date of amended pleading.

191. Every writ of any description whatsoever to be hereafter issued out of the said Superior Courts of Common Law or the Court of Exchequer Chamber may be issued and tested or made returnable on any day, not being one of the days hereby appointed as holidays (r), whether such day shall be in term time or vacation, and every such writ so issued, tested, or returnable shall be of the like validity, force, and effect as if the day of the issuing, testing, or return of such writ were actually a day in term: Provided always, that nothing herein contained shall affect the process and practice of the revenue side of the Court of Exchequer.

Writs to be tested and returnable in vacation as well as in term.

(r) When the return to a writ of *sci. fa.* purported to have been made on Whit Monday, it was held not to be a nullity (*Brown v. Cochrane*, 3 Ir. Jur. O. S. 352).

192. Every rule or order in the said Superior Courts and the Court of Exchequer Chamber may be made, entered, or issued on or as of any day except the days hereby appointed to be observed and kept as holidays, whether such day shall be in term time or vacation; and the days limited for compliance with such rules or orders shall, with the exception of the days hereby appointed to be observed and kept as holidays, and of the days between the first day of *August* and twentieth day of *October*, run in vacation as well as in term time (s).

Rules shall issue and run in vacation as well as in term time.

(s) As to the manner in which time is to be computed, see further, sect. 231, *post*; and the 6th G. O., 1854, and the notes thereto.

193. In all cases upon interlocutory applications where the Court or a Judge shall deem it proper to award costs to either party, it shall be optional with the Court or a Judge either to refer the costs to the taxing officer to be taxed, or by the order direct the payment of a sum in gross in lieu of taxed costs, and also to direct by and to whom such sum in gross shall be paid.

Court on motion may order a fixed sum to be paid in lieu of taxed costs.

Action of Ejectment.

Ejectment to be commenced by writ of summons and plaint. 15 & 16 Vict. c. 76, sects. 168, 175.

With respect to the action of ejectment (a):

194. Where any party shall claim possession of any lands, tenements, or hereditaments, and shall be desirous of proceeding by ejectment for the recovery of the same in any of the said Superior Courts of Law, such party shall commence any action for such purpose by a writ of summons and plaint, which writ shall be directed to the immediate tenant, or any one tenant in possession, as defendant, with the addition of the words, "and all persons concerned" (b), and shall, in addition to any particulars hereinbefore required (c), contain the description of the property sought to be recovered with reasonable certainty, and the county, barony, or parish in which the same is situated (d): Provided, however, that no want of "reasonable certainty" in the description of the property, or part of it, in the summons and plaint or copy, shall nullify them, but shall be ground for an application to the Court or a Judge for better particulars of the land claimed, which the Court or a Judge shall have power to give in all cases, upon the application of any person named as a defendant, or interested in the lands claimed or supposed to be claimed (e).

Enactments relating to ejectment.

(a) The proceedings in ejectments brought in the Superior Courts are now regulated by sects. 194-227 of the present Act; sects. 89, 94, 95 of the Common Law Procedure Act, 1856; sects. 52, 53, 55-58, 60, 62, 64-67, 70, 71-74, 75, 77, 94-96 of the Landlord and Tenant Law Amendment Act (Ireland) 1860 (23 & 24 Vict. c. 154), and 184-191 G. O., 1854, and 3, 4 G. O., 1856. The 12th section of the 1 & 2 Wm. 4, c. 31, deals with ejectments brought by a landlord where the right of entry accrues, or the tenancy expires, in or after Hilary or Trinity Term, but although this enactment has not been repealed, its provisions are practically obsolete.

To whom writ directed.

(b) The writ must be directed to the immediate tenant, or any one tenant in possession, as defendant, with the addition of the words, "and all persons concerned." However, in the case of vacant possession, where the immediate tenant is dead, the writ may be directed "to the assignees and personal representatives of A. B. deceased" (*Harrington v. Bytham*, 2 C. L. R. 1033). Provided the writ is served on all the persons in possession, it is unnecessary to name them all as defendants. A sub-tenant may be named as a defendant when he is in possession of the whole or a part of the premises for which the ejectment is brought (*Doe d. Turner v. Gee*, 9 Dowl. 612).

Names and residences of parties.

The writ should state correctly the names of the parties, but a misnomer is rarely ground for setting the writ aside (*Doe d. Frost v. Roe*, 3 Dowl. 563; *Wells v. Suffield*, 4 C. B. 750; *Doe d. Smith v. Roe*, 6 Dowl. 629). The residences of the parties, plaintiffs or defendants, need not be stated, and if the plaintiffs sue, or the defendants are sued, in a representative capacity,

it is unnecessary to describe them as suing or sued in such capacity (*Swanton v. Gould*, 9 Ir. C. L. R. 234).

(c) "Hereinbefore," i. e. by this section.

(d) If the venue is laid in the proper county, and the premises are described with reasonable certainty, the omission of the barony and parish will be considered a mere technical error, which the Court will allow the plaintiff to amend (*Dombrain v. Carpenter*, 4 Ir. Jur. N. S. 247). As to what constitutes a sufficient description of the premises, see *Furlong's L. & T. ed. Latouche*, pp. 964, *et seq.*

Omission of barony and parish.

(e) An order for better particulars does not operate as a stay of proceedings (*Doe d. Roberts v. Roe*, 13 M. & W. 691; 2 D. & L. 673). As to the circumstances under which an order will be made, see *Doe d. Saxton v. Turner*, 11 C. B. 896; *Doe d. Egremont v. Williams*, 7 Q. B. 686; *King v. Armstrong*, Ir. R. 2 C. L. 495.

Order for better particulars.

195. The writ of summons and complaint in ejectment shall state the names of all the persons in whom the title is alleged to be (f), and command the persons to whom it is directed (g) to appear, within twelve days after the service thereof, in the Court into which such writ is returnable, to defend the possession of the property sued for, or such part thereof as they may think fit, and the writ shall be dated and endorsed, and continue in force, and be renewed, and shall be filed after service thereof, in like manner as hereinbefore enacted, with reference to the writ of summons and complaint in a personal action (h), and in cases of ejectment on the title, it shall be lawful for the plaintiff, by such writ, to claim damages for the loss of the mesne rates and profits of the land sought to be recovered; and in case of ejectment for non-payment of rent, such writ shall be endorsed with the full particulars of the rent due, and of all credits to which the defendant shall be justly entitled (i), and may be in the form No. 15 in the Schedule B. to this Act annexed, or to the like effect; and the same proceedings may be had to ascertain whether the writ was issued by the authority of the attorney whose name was contained in, or endorsed thereon, and who and what the plaintiffs are, and their abode, and as to staying the proceedings upon writs issued without authority, as in the case of writs in personal actions.

Form and duration of writ of summons in ejectment. 15 & 16 Vict. c. 76, s. 169.

(f) The writ should state the names of all the persons in whom the title is alleged to be, and proof of title in any one or more of several plaintiffs, is sufficient to entitle a verdict to be entered for such plaintiff or plaintiffs (sect. 203). Until the passing of the 23 & 24 Vict. c. 154, the persons in whom the legal estate in the lands was vested, were necessary parties as plaintiffs in all ejectments; but it is provided by the 52nd section of that Act, that, in ejectments for non-payment of rent, brought by landlord against

Who should be plaintiffs.

Plaintiffs in ejectments for non-payment of rent.

tenant, "the plaintiff's right to sue as such landlord shall not be defeated by proof merely that the legal estate in the rent or lands, is vested in any other person not a party to such suit or proceeding, but who would be a trustee for the plaintiff, provided that the plaintiff was at the time of the institution of such suit or other proceeding, the person substantially and beneficially entitled to the said rent." The 53rd section of the 23 & 24 Vict. c. 154, also provides that, "in any ejectment under the Act, it shall not be necessary to allege or prove the making of any demand or re-entry, or the existence of any clause or condition of re-entry in the lease or other contract, or of any legal reversion expectant on the determination of the same, and subsisting in the landlord, provided a tenancy between the parties shall appear to exist, whether by original contract or by lawful assignment, devise, bequest, or act or operation of law."

Tenants in common.

The writ need not state whether the plaintiffs sue as joint-tenants, tenants in common, coparceners, or otherwise (*Ellis v. Ellis*, E. B. & E. 81; *Lloyd v. Davies*, 15 C. B. 78). Tenants in common can recover the entire property in one writ; but each tenant in common may bring a separate ejectment to recover his undivided share of the lands (*Denn v. Burgess v. Purvis*, 1 Burr. 326; *Ross v. Power*, 2 B. & P. N. R. 2).

Striking out plaintiff where name used without consent.

Any person named as a plaintiff without his consent will be struck out of the record on his application, unless it is shown that he is a trustee for one or more of the other plaintiffs (*Montgomery v. Montgomery*, 6 Ir. C. L. R. 522; *Sullivan v. Sullivan*, *ibid.* 523); and the Court has no jurisdiction to compel a person under such circumstances to allow his name to be used, on receiving an indemnity against costs (*ibid.*). By the 19th G. O., 1854, the taxing officer is empowered to allow a fee to counsel upon a case to advise as to parties, or otherwise, previously to the institution of any action of ejectment, wherever he may consider such case to have been necessary.

Cease to advise as to parties.

(g) See sect. 194, note (b), as to the persons to whom the writ should be directed.

Date, indorsement, and renewal.

(h) The provisions in respect of the date of the writ (sect. 8, p. 5, *ante*), the indorsement of the attorney's name and address (sect. 12, p. 11, *ante*), and the renewal of the writ (sect. 28, p. 23, *ante*) in personal actions, are applicable to writs of summons and plaint in ejectment; and sect. 227 provides that all other provisions contained in the Act shall extend to ejectments, *mutatis mutandis*, unless where the same shall not be applicable, or where the subject matter thereof is otherwise provided for.

Indorsement on ejectments for non-payment of rent.

(i) By the 23 & 24 Vict. c. 154, s. 60:—"Every summons and plaint in ejectment in the Superior Courts, and civil bill process or ejectment in the Court of the Chairman, for non-payment of rent, shall contain, or have indorsed thereon, a statement of the amount claimed to be due to the landlord for rent, after all just and fair allowances up to the time of bringing such ejectment, and the times at which such rent accrued due, and that if the amount thereof, together with a sum for costs not exceeding (in the case of such summons and plaint) £1 10s.; and in the case of a civil bill process, 10s., be paid to the plaintiff or his attorney, or known agent, or receiver, within ten days from the service of such summons or process, all further proceedings will be stayed; and upon payment or tender within the time so mentioned of the sum so claimed, and costs to the plaintiff or his attorney, or known agent, or receiver, all further proceedings in respect of the rent claimed shall cease, and be stayed accordingly."

Mesne rates.

This section enables the plaintiff to include a claim for mesne profits in an

ejectment on the title, and for rent in an ejectment for non-payment of rent. Prior to this Act, damages for the loss of the mesne rates and profits of the lands comprised in the ejectment were recovered by a subsequent action of trespass, in which the judgment in ejectment was conclusive evidence of the plaintiff's title.

If there is no defence, or only a partial defence, the plaintiff is entitled to judgment for the possession of the lands, but the rent or mesne rates, and the costs of the ejectment, can only be recovered by an independent action (sect. 201). If a defence be filed, but the defendant fails to appear at the trial, the plaintiff is entitled to a verdict, without proof of his title, and may prove and recover the amount of the rent due, or the damages sustained by reason of the mesne rates and profits (sect. 205).

The 77th section of the 23 & 24 Vict. c. 154, enables the plaintiff, in ejectments for non-payment of rent, or for overholding, to have the mesne rates assessed up to the time of the trial. That section provides, that "in case of any ejectment for non-payment of rent, or for overholding any premises, in any of the Superior Courts of Law, where the summons and plaint shall include a claim for rent or mesne profits, the plaintiff, on proof of his right, may recover the possession of the whole or some part of the premises mentioned in the summons and plaint in ejectment, and the rent or mesne profits claimed thereby, and also the further mesne profits thereof, which might have accrued, from the day to which the mesne rates claimed have been calculated, or from the day on which the rent, for the non-payment of which the ejectment shall be brought, fell due, to the day of such trial, or some preceding day, to be specified."

Where no defence.

Where defendant does not appear at trial.

Assessment of mesne rates in ejectments for non-payment of rent, and for overholding g.

196. The venue shall be laid in the county in which the lands are situate, but the Court or a Judge may, on the application of either party, order that the trial shall take place in any county or place other than that in which the venue is laid; and such order being suggested on the abstract, the trial may be had accordingly (j).

Trial may be ordered to take place in any county. 15 & 16 Vict. c. 76, s. 182.

(j) An application under this section should not be made before issue joined (*Guardians of Youghal Union v. Atkinson*, 9 Ir. C. L. R., Ap. 17).

Application when made.

Where after judgment had been marked, it appeared that the venue had been laid by mistake in a county different from that in which the lands were situate, the Court refused to change the venue (*The Grocers' Company v. Coll*, 9 Ir. C. L. R. Ap. 8).

197. The writ shall be served in the same manner as an ejectment has heretofore been served, or in such manner as the Court or a Judge shall order; and in case of vacant possession, by posting a copy thereof upon the door of the dwelling house or other conspicuous part of the premises (k).

Service of ejectment. 15 & 16 Vict. c. 76, s. 170.

(k) In ejectments on the title, the writ must be served on every person in actual possession of the lands, sought to be recovered or any part thereof, or in receipt of the rents and profits of the same or any part thereof, or who

Persons to be served. Ejectment on the title.

shall claim to be entitled to the present receipt of the same, or of any part thereof (184th G. O., 1854).

Ejectments
for non-pay-
ment of rent.

In ejectments for non-payment of rent, brought under the provisions of the Landlord and Tenant Law Amendment Act (Ireland), 1860, it is unnecessary to serve with the summons and plaint any person other than the person or persons in the actual possession of the lands as tenant or under-tenant (23 & 24 Vict. c. 154, s. 55); and by s. 74 of the same Act, it is provided that "the summons and plaint in ejectment for the recovery of any lands or premises holden over after the expiration or determination of the term or interest of any tenant thereof, shall and may be served upon the like persons, and in the like manner as hereinbefore required in case of an ejectment for non-payment of rent under this Act."

Mode of
service.
Ejectments
on the title.

The 188 G. O., 1854, provides, that "the writ of summons and plaint in ejectment may be served personally on any party to be served therewith, wherever he may be found within the jurisdiction, or at his usual place of residence wherever it may be within the jurisdiction, on his servant, or on his wife, child, or other member of his family, being an inmate of the house and aged sixteen years and upwards; and in all cases where such service shall not have been effected, an application may be made to the Court to substitute service, or have any service already had deemed good."

Substitution
of service.

When the defendant is resident out of the jurisdiction, an order may be obtained to substitute service by serving the agent or representative of the defendant within the jurisdiction (*Poole v. Griffith*, 14 Ir. C. L. R. Ap. 20). It has been held, that the 34th section, p. 29, *ante*, does not apply to actions of ejectment; but the Court has power to substitute service of the writ in such actions under its general jurisdiction and the provisions of the present section (*Poole v. Griffith*, *ubi supra*).

Absconding
defendant.

When the tenant absconds, or keeps out of the way to avoid service, or cannot be discovered, the writ should be served on any person residing on or occupying the premises; or in the case of vacant possession a copy of the writ should be posted on the door of the dwelling-house, or upon some conspicuous part of the premises (*Fagan v. Shannon*, 2 Ir. Jur. N. S. 333).

Mode of
service.
Ejectments
for non-pay-
ment of rent.

The 56th section of the 23 & 24 Vict. c. 154, enacts, that "service of the summons and plaint or civil bill process in ejectment for non-payment of rent on any person in the actual possession as tenant or under-tenant of the premises sought to be recovered, or any part of them, shall be effected either by personal service of the summons and plaint or civil bill process on such tenant or under-tenant at any place in Ireland, or by leaving a copy thereof with the wife, child, father, mother, brother, or sister of the party, or with any servant or clerk of the said party, at his dwelling-house or office or place of business (the person with whom such copy shall be left being of the age of sixteen years or upwards), or in such other manner as shall appear to the Court or Judge thereof to be sufficient."

The 57th section of the same Act provides that, "in case there shall be no person in the actual possession of the premises as tenant or under-tenant on whom service of such summons and plaint or civil bill process in ejectment can be effected, it shall be lawful instead thereof to affix a copy of such summons or civil bill process on some conspicuous part of the premises, and also on the usual place for affixing notices in the nearest market town to the said lands: Provided, however, that in such case, before any decree or judgment by default shall be given, the Court or a Judge shall be satisfied that there was no person in actual possession on whom other service might have been

effected: Provided also, that, in case of an ejectment for non-payment of rent reserved upon any lease of tithes, tithe rent-charge, or other ecclesiastical dues, the Court in which the ejectment is brought may order service to be made by posting the ejectment upon the church door of the parish or union of parishes wherein such tithe, tithe rentcharge, or ecclesiastical dues are payable, and if there be no such church in the parish or union of parishes, upon some public and conspicuous place in the said parish or union."

When the plaintiff has complied with the requirements of the latter section, and the full time for pleading has elapsed from the date of the last posting, the Court may give leave to the plaintiff to mark judgment, in addition to ordering that the service had been deemed good service (*Shaw v. Warmington*, 1r. R. 3 C. L. 99).

By the 74th section of the 23 & 24 Vict. c. 154, it is provided, that the summons and plaint in ejectments for overholding, shall be served in the like manner as ejectments for non-payment of rent. Ejectments for overholding.

As to the affidavit of service in ejectments on the title, see 185 G. O., 1854. As to the affidavit in ejectments for non-payment of rent, see 4 G. O. of 22nd January, 1856, and 23 & 24 Vict. c. 154, s. 56, *supra*. Affidavit of service.

198. Every defence to a summons in ejectment on the title shall be in the Form No. 16 in the Schedule B. to this Act annexed, or to the like effect; and every defence to an ejectment for non-payment of rent shall set forth the substantial ground of the defence, as, for example, whether the title of the plaintiff as landlord is disputed, or the fact of the rent being due if in dispute; and such defence shall be endorsed with the particulars of any payments made, and may be according to the Form No. 17 in the said Schedule B. (1). Form of defence in ejectment. 15 & 16 Vict. c. 76, s. 173.

(1). A strict attention to the forms in the schedule is unnecessary (*Norton v. Johnson*, 7 Ir. Jur. O. S. 126); but a defence which is irregular or embarrassing may be set aside on motion. Form of defence.

Where a defence in the form prescribed for an ejectment on the title was pleaded in an ejectment for non-payment of rent, it was set aside as a nullity, (*Phillips v. M'Eroy*, 7 Ir. Jur. O. S. 126).

A defence in an ejectment for non-payment of rent, stating that the defendant had paid the rent, but not setting forth particulars by indorsement, will be set aside (*Smith v. Gilroy*, 7 Ir. Jur. O. S. 47; *Hughes v. Brown*, 13 Ir. C. L. R. App. 5; *Moore v. Fisher*, 5 Ir. Jur. N. S. 291).

A defence of set-off cannot be pleaded to an ejectment for non-payment of rent (*Cahill v. Kearney*, 1r. R. 2 C. L. 498). Set-off.

Where, in an ejectment for non-payment of rent, the defendant named in the ejectment is desirous of traversing the plaintiff's title, it is a good defence to plead that "the defendant does not hold the premises in the plaint mentioned as tenant to the plaintiffs as alleged" (*Keene v. M'Blaine*, 17 Ir. C. L. R. 654; *Elgee v. O'Hare*, 3 Ir. L. T. 468; *Dexter v. Lloyd*, 10 Ir. Jur. N. S. 116). If there are several defendants named in the writ, one of the defendants may plead "that he, together with the other defendants in the suit, does not hold the lands in the plaint mentioned in manner and form

therein alleged" (*Murphy v. Carey*, 12 Ir. C. L. R. App. 9; 17 Ir. C. L. R. 658 *in notis*). See also as to this form of defence, *Figgis v. Hickey*, 7 Ir. Jur. O. S. 160; *Dillon v. Mangan*, 1 Ir. Jur. N. S. 335; *Bell v. Beatty*, 6 Ir. C. L. R. 399; *Gore v. M'Cullagh*, 2 Ir. Jur. N. S. 116.

Partial defence. 15 & 16 Vict. c. 76, s. 174.

199. Any person taking defence as aforesaid to an ejectment on the title shall be at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty, otherwise the defence shall be deemed to apply to the whole; but a defence to an ejectment for non-payment of rent shall be a defence for all the lands and premises in the summons mentioned; and in case a defendant shall desire to take defence for part only of the premises, upon the ground that such part was not included in the lease or other instrument sought to be evicted, he shall make a special application to the Court for that purpose (*m*).

(*m*) As to partial defences in ejectments for non-payment of rent, see *Nicholson v. Ejector*, Cr. & D. Abr. N. 418; *Hutchinson v. Ejector*, 13 Ir. L. R. 380.

Where a general defence was taken to an ejectment for non-payment of rent, it was held that it was not competent for the defendant to prove at the trial that the premises in his possession were not a portion of those comprised in the declaration (*Mayor of Kilkenny v. Ryan*, 2 Ir. Jur. O. S. 87).

Where one of the several defendants in an ejectment for non-payment of rent applied for leave to take a limited defence for a small portion of the lands sought to be evicted, the Court in granting the application allowed the plaintiff to enter into possession of those parts of the lands for which defence had not been taken (*Boyce v. Shehan*, 3 Ir. Jur. O. S. 851).

Defence of persons not named or in possession. 15 & 16 Vict. c. 76, ss. 172, 176.

200. Any other person not named in or served with such writ shall by leave of the Court or a Judge, be allowed to defend, on filing an affidavit showing that he is in possession of the land, either by himself or his tenant (*n*); and the Court or a Judge shall have power to strike out or confine any defence set up by a person not in possession by himself or his tenants (*o*).

Who may take defence.

(*n*) Any person named in or served with the writ of summons and plaint in ejectment, whether in possession or not of the premises sought to be recovered is entitled as of right to appear and take defence (*Marquis of Ormond v. Burke*, 6 Ir. Jur. O. S. 112).

Under the present section any other person not named in or served with the writ who is in possession either by himself or his tenant, may take defence by leave of the Court or a Judge. The application in such cases must be made by motion on notice (*Meath v. Strong*, 2 Ir. Jur. N. S. 394); and if

a *prima facie* case of possession be made out, the Court will not entertain nice questions as to the right of possession, and will allow a defence to be filed as a matter of right (*Croft v. Lumley*, 4 E. & B. 608; *Butler v. Meredith*, 11 Exch. 85).

If the application is made in due time the person applying will not be required to give security for costs although resident out of the jurisdiction (*Butler v. Meredith*, 11 Exch. 85).

Where a party had issued an *elegit* but had not obtained possession, leave to take defence was refused, although he had recovered in an ejectment on the *elegit* (*Croft v. Lumley*, *ubi supra*).

A person who has obtained leave to take defence has all the rights of an ordinary defendant, and if the summons and plaint is not filed within two months he may rule the plaintiff under sect. 38, *ante* (*Dwyer v. Commissioners of Public Works*, 6 Ir. Jur. O. S. 247).

(o) Where an ejectment on the title was brought for the recovery of a farm, and the occupying tenants holding separate parcels took defence for the entire premises, an order was made that they should confine their defence to the parts in their possession (*O'Hara v. Griffin*, 1 Law Rec. N. S. 93; *M'Kee v. M'Kee*, 1 Law Rec. O. S. 422); but where the occupiers of part of a house took defence for the entire, the Court refused to restrict the defence to the part in the defendant's possession (*Browne v. Mason*, 1 Jebb & Sym. 31); and see, also, *White v. Rumgon*, Hay & J. 255; *Power v. Connellan*, 9 Ir. L. R. 266; *Doe d. Lloyd v. Roe*, 15 M. & W. 431.

Confining
defence.

201. In case no defence be filed within the time appointed or if the defence filed be limited to part only, the plaintiff shall, on filing an affidavit of the service of the summons and plaint, be at liberty to sign a judgment that the plaintiffs shall recover possession of the land, or of the part thereof to which the defence does not apply; and such judgment, if for all, may be in the Form No. 18. contained in the Schedule B. to this Act annexed, or to the like effect, without any award of costs, but without prejudice to the plaintiff's right to have the costs taxed by the proper officer, and to proceed by action for recovery of mesne rates and costs, or either of them; and the said judgment for part may be in the Form No. 19. contained in the said Schedule B. to this Act annexed, or to the like effect; and a memorandum of such judgment shall be recited in the abstract of Nisi Prius or judgment thereafter to be made up (*p*).

Judgment by
default for
want of de-
fence. 15 &
16 Vict. c. 76,
s. 177.

(p) Where a defence is filed within the time appointed, or the defence filed is limited to part only, the plaintiff is entitled to sign a judgment for the recovery of the land or of the part to which the defence does not apply, but no costs are recoverable under such a judgment, and the rent or mesne rates, if claimed, and the costs must be recovered by an action of trespass for mesne profits (*Farquhar v. Kelly*, 4 Ir. C. L. R. 490; *Johnson v. Garde*, *ibid.*, 490 n. 7 Ir. Jur. O. S. 239).

Judgment by
default.

The present section is applicable to a case where a defence has been filed, but has subsequently been set aside for irregularity (*Johnson v. Garde, ubi supra*).

Ejectment
for non-pay-
ment of rent.

The 58th section of the 23 & 24 Vict. c. 154, provides, that "in any ejectment for non-payment of rent brought in any of the Superior Courts of Law, when the tenant shall not take defence to the ejectment, the affidavit of the landlord, his agent, receiver, or clerk stating the amount of rent due at the time of the bringing of the ejectment, over and above all just and fair allowances, shall be sufficient evidence of the amount due, and shall, when the same amounts to or exceeds one year's rent, entitle the landlord to judgment for the possession of the premises, provided an affidavit of the service of the summons and plaint in such ejectment shall have been duly filed according to the practice of the Court." And see section 206, *post*.

By the 3 G. O., 22nd January, 1856, the filing of the ejectment or a copy thereof for the purpose of enforcing an appearance and defence by any person who has been served is deemed to be a sufficient filing for the like purpose, as against any person or persons subsequently served, so as to entitle the plaintiff to enforce an appearance and defence from each person, so subsequently served; but no person served is permitted to defend after the time allowed for that purpose, and only one judgment is to be entered, which judgment is not to be entered until the time for taking defence allowed to the person last served has expired.

Abstract of
issues. 15 &
16 Vict. c. 76,
ss. 178, 180.

202. In case a defence shall be filed, an abstract of the issue for *Nisi Prius* may at once be made up by the plaintiffs or their attorney, setting forth the writ, and stating the fact of the defence, with its date, of each of the persons taking defence, so that it may appear for what defence is made; and such abstract may be in the Form No. 20. contained in Schedule B. to this Act annexed, or to the like effect, and such abstract shall be lodged with the pleadings assistant in the manner herein-after provided; and the question at the trial, except in the case herein-after mentioned, shall be whether the statement of the title of the plaintiffs in the summons and plaint is true or false, and if true, then which of the plaintiffs is entitled, and whether to the whole or part, and if to part, then to which part of the property in question, and whether to any, and, if any, to what damages by way of compensation for loss of mesne rates and profits; and upon the trial of any issue in an ejectment for non-payment of rent the amount of the rent due to the plaintiff shall be found by the jury (g).

(g) The form of issue set out in Schedule B. may be varied according to the defence pleaded.

As the general provisions of the Act are applicable to ejectment, if the plaintiff neglects to make up the abstract, the defendant may proceed to have

the abstract of issues settled in the same manner as the plaintiff might have done, sect. 107.

203. The proof of title in any one or more of several plaintiffs in ejectment shall be sufficient to entitle a verdict to be entered for such plaintiff or plaintiffs; and it shall not be necessary to produce or prove upon any trial of an ejectment the affidavit of service of the writ of summons. Proof of title.

204. In case the title of the plaintiff(r) shall appear to have existed as alleged in the writ at the time of service thereof, but it shall also appear to have expired before the time of trial, the plaintiff shall, notwithstanding, be entitled to a verdict, according to the fact that he was so entitled at the time of bringing the action and serving the writ, and to a judgment for his costs of suit (s). Verdict when title appears to have expired before trial. 15 & 16 Vict. c. 76, s. 181.

(r) The "title of the plaintiff" means his right to possession of the premises for which the ejectment is brought, at the time of the issuing of the summons and plaint. Under the former practice the Court would not stay the proceedings in an ejectment on the ground of the lessor's title having expired after action brought, because, although possession could not be obtained, the plaintiff was entitled to proceed for damages and costs (*Thrustout v. Gray*, 2 Str. 1056; *Dodd. Butt v. Rous*, 1 E. & B. 419).

(s) Where a defendant in ejectment who claimed under an unregistered lease subsequent in date to an unregistered lease under which the plaintiff derived, registered his lease after action brought and before the trial, it was held, that the plaintiff was entitled to a verdict and judgment under the present section (*Ryan v. Landers*, 9 Ir. C. L. R. 487).

Where an ejectment for overholding was brought by a lessee of a term against a sub-lessee of the same term less ten days, and the writ was issued before the expiration of the plaintiff's term, but at the time of the trial both the plaintiff's and the defendant's terms had expired, it was held, that, in the absence of any affirmative evidence that the plaintiff had no other title besides the term that had expired, the plaintiff's title must be taken to be good as against the defendant, and he was entitled to a writ of *habere* (*Gubbins v. Buckland*, 1 H. & C. 736; 32 L. J. Ex. 156).

205. If the defendant appears, and the plaintiff does not appear at the trial, the plaintiff shall be nonsuited; and if the plaintiff appears, and the defendant does not appear, the plaintiff shall be entitled to a verdict, without any proof of his title, and in case of ejectment on the title shall be entitled to prove the amount of damages sustained by reason of the loss of the mesne rates and profits, and in case of an ejectment for nonpayment of rent shall be entitled to prove the amount of rent actually due, and to have a verdict for the same. Non-appearance at trial. 15 & 16 Vict. c. 76, s. 183.

Ascertainment of rent.

206. In ejectment for non-payment of rent, where judgment shall have gone by default (t) or the defendant shall not appear at the trial, it shall be sufficient, for the purpose of ascertaining the amount of the rent due, and to satisfy the provisions of the Statutes with respect to the ascertaining the rent, that an affidavit of the plaintiffs, or one of them, or their or his agent, to the effect that an amount of rent not less than one year's rent, and specifying the same, was due at the time of the commencement of the action, after all just allowances shall have been made.

(t) See 23 & 24 Vict. c. 154, s. 58, *ante*, p. 224. A judgment by default is merely for the recovery of the lands, and the rent and costs can only be recovered by a separate action, *vide* a. 201, *ante*.

Judgment and execution upon finding for plaintiff. 15 & 16 Vict. c. 76, s. 185.

207. Upon a verdict for the plaintiff, judgment may be signed, and execution issued for the recovery of possession of the property, or such part thereof as the jury shall find the plaintiff entitled to, and in case of an ejectment on the title, for such damages for loss of mesne rates and profits as shall be found by the said jury, and in case of ejectment for non-payment of rent for recovery of so much rent as shall be found to be due, and costs, within such time, not exceeding the fifth day in term after the verdict, as the Court or Judge before whom the cause is tried shall order, and if no such order be made, then on the fifth day in term after the verdict, or within fourteen days after such verdict, whichever shall first happen (u).

(u) "Within fourteen days" means upon the expiration of fourteen days (*O'Meara v. Foley*, Ir. R. 4 C. L. 116); see also s. 127, *ante*.

Judgment and execution upon finding for defendant. 15 & 16 Vict. c. 76, s. 185.

208. Upon a verdict for the defendants, or any of them, or upon a nonsuit, judgment may be signed, and execution issue for costs against the plaintiffs named in the writ, within such time, not exceeding the fifth day, in term after the verdict or nonsuit, as the Court or Judge before whom the cause is tried shall order, and if no such order be made, then on the fifth day in term after the verdict or nonsuit, or within fourteen days after such verdict, whichever shall first happen (v).

(v) "Within fourteen days" would appear to be equivalent to "after the expiration of fourteen days" (*O'Meara v. Foley*, Ir. R. 4 C. L. 116), see note (u), *supra*.

209. Upon any judgment in ejectment there may be either one or several writs of execution for the recovery of the possession, and for the damages or the rent ascertained to be due, and costs, at the election of the plaintiff (w).

Execution in
ejectment.
45 & 16 Vict.
c. 76, s. 187.

(w) Where the plaintiff in an ejectment on the title obtained, besides a verdict for the possession, a verdict for a less sum than £10 for mesne rates, it was held that, under the 11 & 12 Vict. c. 28, he was not entitled to issue a *ca. sa.* on the judgment obtained by him (*Wright v. Langford*, Ir. Rep. 3 C. L. 418).

The plaintiff may either issue a writ of *habere facias possessionem* and a separate writ of *fi. fa.* or *ca. sa.* for the rent or mesne rates and costs, or he may sue out a writ of *habere* adding a *fi. fu.* or *ca. sa.* to it, as the case may be.

210. In case of such an action being brought by some or one several persons entitled as joint tenants, tenants in common, or coparceners, any joint tenant, tenant in common, or coparcener in possession may set forth in his defence that he is such joint tenant, tenant in common, or coparcener, and defends as such, and admits the right of the plaintiff to an undivided share of the property, stating what share, but denies any actual ouster of him from the property, and upon the trial of such an issue the additional question of whether an actual ouster has taken place shall be tried (x):

Defence by
joint owners.
15 & 16 Vict.
c. 76, s. 188.

(x) As to what amounts to actual ouster, see *Doe d. Hellings v. Bird*, 11 East, 49; *Doe d. Wawn v. Horn*, 5 M. & W. 564; *Fairclaim v. Shackleton*, 5 Burr. 2604.

211. Upon the trial of such issue as last aforesaid, if it shall be found that the defendant is joint tenant, tenant in common, or coparcener with the plaintiff, then the question whether an actual ouster has taken place shall be tried, and unless such actual ouster shall be proved the defendant shall be entitled to judgment and costs; but if it shall be found, either that the defendant is not such joint tenant, tenant in common, or coparcener, or that an actual ouster has taken place, then the claimant shall be entitled to such judgment for the recovery of possession and costs (y).

Judgment
against
joint owners.
15 & 16 Vict.
c. 76, s. 189.

(y) As to what constitutes actual ouster, see note (x), *supra*.

212. The death of a plaintiff or defendant in ejectment shall not cause the action to abate (z).

Action not to
abate by
death of
plaintiff. 15
& 16 Vict. c.
76, s. 190.

(z) See s. 155, *ante*.

Suggestion of death of plaintiff. 15 & 16 Vict. c. 76, s. 191.

213. In case the right of a deceased plaintiff shall survive to another plaintiff, a suggestion may be made of the death, which suggestion shall not be traversable, but shall only be subject to be set aside if untrue, and the action may proceed at the suit of the surviving plaintiff; and if such suggestion shall be made before the trial, then the plaintiff shall have a verdict, and recover such judgment as aforesaid, upon its appearing that he was entitled to bring the action either separately or jointly with the deceased plaintiff (a).

(a) See sect. 155, *ante*.

Death before trial of plaintiff where right does not survive. 15 & 16 Vict. c. 76, s. 192.

214. In case of the death before trial of one of several plaintiffs whose right does not survive to another or others of them, where the legal representative of the deceased plaintiff shall not become a party to the suit in the manner herein-after mentioned, a suggestion may be made of the death, which suggestion shall not be traversable, but shall only be subject to be set aside if untrue, and the action may proceed at the suit of the surviving plaintiff for such share of the property as he is entitled to, and costs (b).

(b) The legal representatives of one of several plaintiffs whose right does not survive, may become parties under sect. 215.

Death of sole plaintiff where right does not survive. 15 & 16 Vict. c. 76, s. 194.

215. In case of the death of a sole plaintiff, or before the trial of one of several plaintiffs whose right does not survive to another, or others of them, the legal representative of such plaintiff may, by leave of the Court or a Judge, enter a suggestion of the death, and that he is such legal representative, and the action shall thereupon proceed; and if such suggestion be made before the trial, the truth of the suggestion shall be tried thereat, together with the title of the deceased plaintiff, and such judgment shall follow upon the verdict in favour of or against the person making such suggestion, as hereinbefore provided, with reference to a judgment for or against such plaintiff; and in case such suggestion in the case of a sole plaintiff be made after a verdict for the plaintiff, and before execution executed by delivery of possession thereupon, and such suggestion be denied by the defendant within eight days after notice thereof, or such further time as the Court or a Judge may allow, then such suggestion shall be tried, and if upon the trial thereof a verdict shall pass for the person making such suggestion he shall be

entitled to such judgment as aforesaid for the recovery of possession, and for the costs of, and occasioned by, such suggestion, and in case of a verdict for the defendant, such defendant shall be entitled to such judgment, as aforesaid, for costs; and in case the said suggestion shall not be denied within the time aforesaid, the said personal representative shall, on producing an affidavit of the service of the notice, be entitled to proceed to judgment and execution in his own name (c).

(c) The provisions of this section only apply to proceedings before final judgment (*Jones v. Finlay*, 3 Ir. Jur. N. S. 180).

See also, sect. 157, *ante*.

Liberty to enter a suggestion may be obtained by an *ex parte* motion (*Mahony v. Lewis*, 6 Ir. C. L. R. 475).

216. In case of a verdict for two or more plaintiffs, if one of such plaintiffs die before execution executed, the other may, whether the legal right to the property shall survive or not, suggest the death in manner aforesaid, and proceed to judgment and execution for recovery of possession of the entirety of the property and the costs; but nothing herein contained shall affect the right of the legal representative (d) of the deceased plaintiff, or the liability of the surviving plaintiff to such legal representative; and the entry and possession of such surviving plaintiff, under such execution, shall be considered as an entry, and possession on behalf of such legal representative in respect of the share of the property to which he shall be entitled as such representative, and the Court may direct possession to be delivered accordingly.

Death of one of several plaintiffs after verdict. 15 & 16 Vict. c. 76, s. 193.

(d) See sect. 218, note (f), *infra*.

217. In case of the death before or after judgment of one of several defendants in ejectment who defend jointly, a suggestion may be made of the death, which suggestion shall not be traversable, but only be subject to be set aside if untrue, and the action may proceed against the surviving defendant to judgment and execution (e).

Death of one of several joint defendants. 15 & 16 Vict. c. 76, s. 196.

(e) Where all the defendants have been served, and one of them dies without having taken defence, leave will be granted to enter a suggestion of his death, in accordance with the former practice, this case not being provided for by the present Act (*Denny v. Jeffcott*, 6 Ir. Jur. O. S. 282; *Kelly v. Caldwell*, 7 Ir. C. L. R. 125; *Hull v. Collins*, 5 Ir. Jur. N. S. 172).

When a party unnecessarily made a defendant was dead at the time of service, the Court gave permission to strike out his name (*Douglas v. Moore*, 8 Ir. L. C. R. App. vi.).

Upon death
of all of the
defendants
before trial.
15 & 16 Vict.
c. 76, s. 196.

218. In case of the death of a sole defendant or of all the defendants in ejectment before trial, a suggestion may be made of the death, which suggestion shall not be traversable, but only be subject to be set aside if untrue; and the plaintiffs shall be entitled to judgment for recovery of possession of the property, unless some other person shall take defence within a time to be appointed for that purpose by order of the Court or a Judge, to be made upon the application of the plaintiffs; and it shall be lawful for the Court or a Judge, upon such suggestion being made, and upon such application as aforesaid, to order that the plaintiffs shall be at liberty to sign judgment within such time as the Court or a Judge may think fit, unless the person then in possession, by himself or his tenant or the legal representative (f) of the deceased defendant, shall within such time defend the action; and such order may be served in the same manner as the writ; and in case such person shall take defence, the same proceedings may be taken against such new defendant as if he had originally appeared and defended the action; and if no defence be made, then the plaintiff shall be at liberty to sign judgment pursuant to the order.

(f) The words "legal representative" signify in cases where the lands are freehold of inheritance, the person who as heir or devisee succeeds to the deceased's rights; or in case the deceased has been tenant for life under a settlement, the person next in remainder (*Hovenden v. Marshall*, 2 Ir. Jur. N. S. 378).

When the sole defendant died, and no will could be found to have been lodged in the proper Courts, the Court made an order requiring the parties into whose possession the property of the deceased had come to enter defence within a specified time, or judgment to be entered in default (*Bolton v. Cullin*, 2 Ir. Jur. N. S. 368).

Death before
trial of de-
fendant in
ejectment
who defends
for part. 15 &
16 Vict. c. 76,
s. 196.

219. In case of the death before trial of one of several defendants in ejectment who defends separately for a portion of the property for which the other defendant or defendants do not defend, the same proceedings may be taken as to such portion as in the case of the death of a sole defendant, or the plaintiffs may proceed against the surviving defendants in respect of the portion of property for which they defend (g).

(g) Under s. 218 proceedings may be taken with reference to that part of the premises for which the defendant who has died has defended.

220. In case of the death before trial of one of several defendants in ejectment who defends separately in respect of property for which surviving defendants also defend, it shall be lawful for the Court or a Judge, at any time before the trial, to allow the person at the time of the death in possession of the property, or the legal representative of the deceased defendant, to defend on such terms as may appear reasonable and just, upon the application of such person or representative; and if no such application be made or leave granted, the plaintiff suggesting the death in manner aforesaid may proceed against the surviving defendant or defendants to judgment and execution.

Death of defendant defending separately for property, in respect of which others also defend. 15 & 16 Vict. c. 76, s. 199.

221. In case of the death of a sole defendant or of all the defendants in ejectment, after verdict, the plaintiffs shall nevertheless be entitled to judgment as if no such death had taken place, and to proceed by execution for recovery of possession, without suggestion or revivor, and to proceed for the recovery of the costs in like manner as upon any other judgment for money against the legal representatives of the deceased defendant or defendants (*h*).

Death of all defendants after verdict. 15 & 16 Vict. c. 76, s. 197.

(*h*) See ss. 159, 160, *ante*.

222. The plaintiff in ejectment shall be at liberty at any time before verdict or judgment against him to discontinue the action as to one or more of the defendants, by giving to the defendant or his attorney a notice, headed in the Court and cause, signed by the plaintiff or his attorney, stating that he discontinues such action; and thereupon the defendant to whom such notice is given shall, by filing an affidavit of the service of such notice, be entitled to and may forthwith sign judgment for costs in the Form No. 21. contained in the Schedule B. to this Act annexed, or to the like effect; and any one of several plaintiffs desirous to discontinue may apply to the Court or a Judge to have his name struck out of the proceedings, and an order may be made thereupon upon such terms as to the Court or Judge may seem fit, and the action shall thereupon proceed at the suit of the other plaintiffs (*i*).

Plaintiff may discontinue by notice. 15 & 16 Vict. c. 76, ss. 200, 201.

(*i*) Under the provisions of this section a sole plaintiff may discontinue as to one or more of the defendants without leave, but one of several plaintiffs desirous to discontinue must apply to the Court or a Judge to have his name struck out of the proceedings.

Defendant
may confess
the action.
15 & 16 Vict.
c. 76, ss. 203,
204.

223. A sole defendant or all the defendants in ejectment shall be at liberty to confess the action as to the whole or part of the property, by giving to such plaintiff a consent for judgment (*j*), headed in the Court and cause, signed (*k*) by the defendant or defendants, such signature to be attested by his or their attorney; and thereupon the plaintiff may forthwith sign judgment and issue execution for the recovery of possession and costs in the Form No. 22. contained in the Schedule B. to this Act annexed, or to the like effect; and in case one of several defendants in ejectment, who defends separately for a portion of the property for which the other defendant or defendants do not defend, shall be desirous of confessing the plaintiff's title to such portion, he may give a like consent for judgment to the plaintiff; and thereupon the plaintiff may forthwith sign judgment and issue execution for the recovery of possession of such portion of the property, and for the costs occasioned by the defence relating to the same, and the action may proceed as to the residue.

(*j*) No consent for judgment containing any stay of execution can be filed without the consent of the plaintiff (46 G. O. 1854).

(*k*) Where more than one of several defendants had taken defence and subsequently had given a consent for judgment signed by their attorney while the other co-defendants went to trial it was held that the consent for judgment being valid independently of the present Act was regular, and that judgment should be marked accordingly (*Fouhy v. Murphy*, 6 Ir. Jur. O. S. 264).

Confession by
one defend-
ant. 15 & 16
Vict. c. 76, s.
205.

224. In case one (*l*) of several defendants in ejectment who defends separately in respect of property for which other defendants also defend shall be desirous of confessing the plaintiff's title, he may give a like consent for judgment; and thereupon the plaintiff may sign judgment against such defendant for the costs occasioned by his defence, and may proceed in the action against the other defendants to judgment and execution.

(*l*) See *Fouhy v. Murphy*, *ubi supra*.

Effect of
judgment in
ejectment. 15
& 16 Vict. c.
76, s. 207.

225. The effect of a judgment in ejectment under this Act shall be the same as that of a judgment in an action of ejectment heretofore used (*m*).

(*m*) In *O'Donnell v. Ryan*, 7 Ir. Jur. O. S. 127, it was held that the action of ejectment having been assimilated to other actions, a judgment in it was

equally conclusive between the parties. However, by the 94th section of the C. L. P. Act, 1856, it is declared that a judgment in an action of ejectment under the present Act shall have no greater effect than a judgment in an ejectment before the passing of the 13 Vict. c. 18 (The Process and Practice Act).

As to the effect of a judgment in ejectment under the old law, see *Aslin v. Parker*, 2 Burr. 665. In an action for mesne profits it is conclusive evidence of the title of the plaintiff from the day named in the writ or found by the jury (*Doe v. Wellman*, 2 Exch. 368; *Turner v. Coalbrook Steam Co.*, 5 Exch. 932; *Wilkinson v. Kirby*, 15 C. B. 430; *Earl Listowell v. Green*, 3 Ir. L. R. 205; *Doe v. Wright*, 10 A. & E. 763).

226. If the judgment in ejectment shall be affirmed by the Court of Error, or the proceedings in error be discontinued by the plaintiff therein, it shall be lawful for the Court wherein execution ought to be granted, upon such affirmation or discontinuance, upon the application of the plaintiff, to issue a writ to inquire as well of the mesne profits as of the damage by any waste committed after the first judgment in ejectment, which writ may be dated on the day on which it shall issue, and be returnable immediately after the execution thereof, and upon the return thereof judgment shall be given, and execution awarded for such mesne profits and damages, and also for costs of suit.

Inquiry as to mesne rates after writ of error, 15 & 16 Vict. c. 76, s. 208.

227. All other provisions herein contained shall extend to ejectments, *mutatis mutandis*, unless where the same shall not be applicable, or where the subject matter thereof shall have been herein otherwise provided for.

General provisions to apply to ejectments.

With respect to the proceedings for recovery of goods and chattels by way of replevin (a):

Action for replevin of goods.

228. Where any party whose goods or chattels have been taken or distrained shall dispute the validity of such taking or distress, and shall be desirous of proceeding for the recovery of such goods and chattels in any of the said Superior Courts, such party may commence a personal action for the recovery of the goods or chattels so taken or distrained by a writ of summons and plaint, which writ of summons shall, in addition to any particulars herein before required in an ordinary writ of summons, state the particulars of the property taken or distrained, and the place where such taking, seizure, or distress shall have been made (b), and shall be served by delivering a copy or copies thereof to the defendant or defendants, or to any agent or other person acting for him or them

Action for replevin to be commenced by writ of summons and plaint.

in making such seizure or distress, or in keeping the goods and chattels so taken or distrained, in the manner hereinbefore provided in respect of an ordinary writ of summons (c).

Replevin.

When it lies.

(a) Replevin is a re-delivery by the sheriff to the owner of his chattels or goods tortiously taken upon surety that he will pursue the action against him that took them. The action lies whenever a man tortiously takes goods and chattels of another and detains them (Com. Dig. Pl. 3 K. 1; *Shannon v. Shannon*, 1 Sch. & Lef. 324, *Allen v. Sharp*, 2 Ex. 352); except where the taking has been under an execution issuing out of a Superior Court, or for a debt due to the crown (Bac. Abr. Tit. Replevin, D. *Rex v. Oliver*, Bunb. 14). It lies, however, only in cases where the goods have been taken by the defendant, and the action cannot therefore be brought for a mere detention (*Shannon v. Shannon*, *ubi supra*; *Mennie v. Blake*, 6 E. & B. 842, 846).

In cases of
ailment.

In practice it is not usual to have recourse to the remedy except in cases of illegal distress, and it has even been questioned whether the remedy is properly applicable in any other cases (*Mennie v. Blake*, *ubi supra*). Notwithstanding, however, the doubts referred to the words of the present section plainly recognise the remedy as applicable to cases of taking other than under a distress, and numerous cases are to be met with where goods have been restored to the owner by means of a replevin, after having been taken out of his possession otherwise than by distress. Thus where goods had been seized under a civil bill decree the Court refused to quash a replevin issued for the purpose of replevying them (*Coote v. Gorman*, 3 Law Rec. O. S. 42. 58); and see *Osborne v. Swan Bank Co.*, 17 L. T. N. S. 96. So, also, goods seized under an order of Justices have been replevied (*Tyndal v. Reads*, Sm. & Bat. 375; *Vanderkiste v. Geary*, 4 Ir. Jur. O. S. 285); or goods seized for poor rates (*Rhymney Railway Co. v. Price*, 16 L. T. N. S. 394). Even where goods have been bailed by the plaintiff to the defendant they have been allowed to be replevied (*Corscaden v. Stewart*, 1 Ir. L. R. 106); and see *Reeves v. Morris*, 3 Ir. L. R. 484, 491; S. C. Arm. Mac. & Og. 159; but in so far as these cases are authorities to show that replevin lies when goods have found their way into the possession of the defendant by virtue of a contract and without any taking they cannot be supported (*Shannon v. Shannon*, *Mennie v. Blake*, *ubi supra*; *Curran v. Sproule*, Bl. D. & O. 133). It has been doubted whether a bailee of goods can maintain replevin (*Butler v. Bridge*, 3 Ir. L. R. 464), but see Bac. Abr. Tit. Replevin, G. H. When goods have been taken by one joint tenant or tenant in common they cannot be replevied (*Reeves v. Morris*, 2 Jebb & Sym. 344). Replevin cannot be brought when the goods at the time of bringing the replevin are in the plaintiff's possession (*Barry v. Purcell*, 2 Ir. C. L. R. 373), and the proceedings in such a case will be set aside.

Against
whom it lies.

Replevin lies against the party who actually took the chattels, or who ordered the taking; and if taken by one person by the direction of another, the action lies against both or either (*Jones v. Johnson*, 5 Ex. 862; *Mellor v. Leather*, 1 El. & Bl. 619). When the plaintiff from whom a mare had been stolen, which was found in the possession of the defendant, who had purchased her from a party accused of having stolen her, had issued a writ of

replevin, under which he had obtained possession of the mare, the Court quashed the writ (*Doyle v. Kelly*, 4 Ir. L. R. 9).

Procedure in replevin.

When a party whose goods have been seized or taken wishes to replevy them his first step is to issue a summons and plaint, as pointed out by the present section. As to the form of the plaint, and the subsequent pleadings and proceedings, see note (b), *infra*. After issuing the plaint, the plaintiff should next issue a writ of replevin directed to the sheriff, commanding him to replevy the goods; and under this writ the possession of the goods will be restored to the plaintiff upon his giving security (sect. 229, *post*.) When the pleadings have concluded, either party may furnish the abstract, and serve notice of trial, in case an issue of fact arises, and after verdict the judgment of the Court will be given for the plaintiff or defendant, as the case may be. In the former case the plaintiff will recover his costs, together with £4 4s. damages. As to the judgment in the latter case, see note (i), *infra*.

As to non-prossing the plaintiff in replevin, see note (h), *infra*; and as to the removal of a replevin from an inferior Court, see the 192nd G. O. 1854.

Summons and plaint.

(b) The summons and plaint in replevin, as provided by the present section, must, in addition to the particulars required in an ordinary plaint, state the particulars of the property taken or distrained, and the place where the taking, seizure, or distress has been made. The prayer for judgment need not pray a return of the goods, as it is by the process, and not by the judgment of the Court, that the plaintiff obtains their return (*Gibbons v. M'Evilly*, Ir. R. 1 C. L. 453).

The summons and plaint, or a copy thereof, must be filed within ten days after service, unless an order to extend the time be obtained; and in default of filing, the defendant may enter a rule under sect. 38, *ante* (19 & 20 Vict. c. 102, s. 100).

Filing.

When the summons and plaint has been filed, the defendant should, within the usual time, file a defence in the nature of an avowry. If the defendant justifies the taking as a distress for the arrears of a rent-charge, the defence should aver compliance with the requirements of 9 & 10 Vict. c. 111 (*Goggins v. Trench*, 10 Ir. C. L. R. 472); but if the distress was for the arrears of rent service, the defence need not aver compliance with these requirements, upon the principle that the general mode of pleading under the statute of avowries is not altered by the 9 & 10 Vict. c. 111; and it therefore lies upon the plaintiff, if he relies upon the fact of those requirements not having been complied with, to plead the non-compliance (*Bewley v. Houghton*, 7 Ir. C. L. R. 283). In such a case the defendant might perhaps be ordered to amend his defence under sect. 48, *ante*. Unless the question of a compliance with the requirements of the Act is specifically raised upon the record the plaintiff cannot at the trial show upon an issue as to whether the goods were taken as a distress, that the requirements in suggestion were not complied with (*Murphy v. Stokes*, 6 Ir. Jur. O. S. 19). As to the form of defence when the action is not brought in the form of replevin but in trespass, see *ante*, pp. 77, 78. The plaintiff may be non-prossed in the manner pointed out in section 106, *ante*, if he do not proceed to trial within one term from that in which or the vacation of which the defence or other subsequent proceeding is filed (19 & 20 Vict. c. 102, s. 100). As to the nature of the judgment pronounced by the Court in an action of replevin, see section 230, note (i), *post*.

Pleadings.

(c) See *ante*, pp. 25-34.

Plaintiff may
sue out also
a writ of
replevin.

229. When any such personal action shall have been so commenced it shall be lawful for the plaintiff therein to sue out of the Court in which such action shall be instituted a writ, to be called a writ of replevin, in the form No. 23. in the Schedule B. to this Act annexed, directed to the sheriff of the county in which such goods and chattels shall be under seizure or distress, requiring him to replevy the said goods and chattels (*d*), and the said sheriff shall and he is hereby required, upon good security (by the bond of the plaintiff, and two responsible persons as sureties, conditioned as usual in such cases), being given to him, in double the amount of the value of the property taken or distrained (*e*), to execute such writ, and to return the said writ, with a correct and proper statement endorsed thereon of the manner in which the same shall have been executed, or the cause why the same has not been executed, to the Court out of which the same shall have issued, within eight days, exclusive of any days hereby appointed to be observed and kept as holidays, next after such writ shall have been delivered to him; provided always, that the value of the property so taken or distrained shall be ascertained by the said sheriff in like manner as the value of goods distrained is now ascertained by law by the sheriff in taking security in replevins (*f*), and that the said bonds shall be assignable by the sheriff under like circumstances and in like manner, and shall be available to the assignee thereof, as by law now or hereafter authorized in respect of replevin bonds (*g*).

What security to be given.

(*d*) As to the cases in which the writ may be issued and when it may be quashed by the Court, see *ante*, note (*a*).

Forfeiture of the bond.

(*e*) Before replevying, it is the sheriff's duty to take security in double the amount of the value of the property from the plaintiff and two sureties. The security is taken by a bond executed by the plaintiff and the sureties to the sheriff. The bond is not, nor is the assignment of it, subject to any stamp duty, 5 Geo. 4, c. 41, s. 1. The condition of the bond is to prosecute the suit with effect and without delay, and also to duly make return of the cattle and goods if a return shall be adjudged (13 Ed. 1, c. 2, 36 Geo. 3, c. 38 (Ir.)). The term "prosecute with effect" means to prosecute with success (*Tummons v. Ogle*, 6 E. & B. 571; *Igoe v. O'Hara*, 1 Jebb & Sym. 443); and the bond will therefore be forfeited as well by the plaintiff failing in the suit as by his delaying in the prosecution of it (*Axford v. Perret*, 4 Bing. 586; *Harrison v. Wardle*, 5 B. & Ad. 146); and when the plaintiff makes delay in the prosecution of the suit it is not necessary to sign judgment of *non pros.* before suing upon the bond (*S. C.*). In *Powell v. Archer*, 4 Ir. C. L. R. 279, the condition of the bond was in the alternative, viz., to prosecute the suit or to make return of the goods; and the Court held that a summons

and plaint which averred as a breach of the condition that there had been a verdict against the plaintiff in the replevin suit, and that he had not returned the goods, was demurrable for not averring that a return of the goods had been awarded. In the ordinary form of replevin bond, however, the condition is in the conjunctive and not in the alternative, and it may be doubted whether a bond in the latter form is assignable (*Powell v. Archer*, *ubi supra*).

If the plaintiff in the replevin suit prosecutes the suit without delay, but dies before it is brought to a termination, the bond will not be forfeited (*Morris v. Matthews*, 2 Q. B. 293; *Leitrim v. Stewart*, 1r. R. 5 C. L. 27; *Ormond v. Bierly*, Carth. 519). Compare with these cases *White v. Murphy*, 1 Hud. & Br. 498.

Death of the plaintiff.

The value of the property seized is to be ascertained by the sheriff or by the replevengers, whom he is bound to appoint within ten days after he is sworn in (14 & 15 Vict. c. 57, s. 42). If insufficient security be taken the sheriff is responsible if it appears that reasonable care was not exercised by him or by the replevengers in ascertaining the solvency of the securities (*Hindle v. Blades*, 5 Taunt. 225; *Chute v. Cronin*, 12 Ir. L. R. 556). The remedy of the party aggrieved in such a case is by action (*Tessyman v. Gildart*, 1 B. & P. N. R. 292); and the Court will not upon motion grant relief against the sheriff for either taking insufficient securities, or for not taking any securities at all (*Rex v. Lewis*, 2 T. R. 617; *Twells v. Colville*, Willes, 375); but see *Reynolds v. Hamilton*, Rowe Rep. 637; *King v. Hartford*, *Id.* If the sheriff refuses to replevy when proper security is tendered an action on the case lies against him (*Sabourin v. Marshall*, 3 B. & Ad. 404).

How value of property ascertained.

Remedy against sheriff.

(f) See last note.

(g) Replevin bonds are assignable under 8 Geo. 1, c. 6, ss. 5 & 6; and 36 Geo. 3, c. 38. The latter Act only applies, however to replevins of a distress for rent (*Igoe v. O'Hara*, 1 Jebb & Sym. 443). The assignment should be made by the sheriff to whom the bond was given, even though his year of office has expired; and if it be made by the incoming sheriff, the assignment will be void (*Owens v. M'Donough*, 7 Ir. C. L. R. 262; *Benison v. Ganly*, 12 Ir. L. R. 316). Where the replevin bond contained a condition beyond what the Statute directed, viz., to indemnify the sheriff, it was held to be nevertheless assignable (*Caithness v. Murphy*, Sm. & Bat. 1); and see *Harding v. Lyhane*, 2 Fox & Sm. 160). In *White v. Murphy*, 1 Hud. & Br. 498, it was held that the defendant in replevin is not bound to procure a return of the writ of replevin or to appear to it before taking an assignment of the replevin bond; and he may proceed against the sureties notwithstanding the death of the principal before the return of the writ and before the assignment. Compare with this case the case of *Morris v. Matthews*, and the other cases referred to above.

Assignment of replevin bond.

As to the meaning of the term "prosecute with effect," see *Tummons v. Ogle*, *ubi supra*. It is not necessary to assign breaches in suing upon a replevin bond, the bond not being within sect. 145, *ante* (2 Wms. Saund. 187 (2); *Middleton v. Bryan*, 3 M. & S. 155).

230. If the plaintiff in any such action for replevin of a distress made for rent shall be non-prossed (h) for not filing his summons and plaint as aforesaid it shall be lawful for the

If plaintiff in replevin be non-prossed.

or nonsuited,
defendant
entitled to
judgment
and execu-
tion for his
rent.

defendant to file a suggestion in the nature of a plaint for rent, and praying the Court to inquire the cause of the distress ; and thereupon, or in case judgment be given for the defendant on demurrer, it shall be lawful for the Court to issue a writ of inquiry to the sheriff of the county wherein the distress was taken, or to the Master of the Court, to inquire touching the amount of rent in arrear at the time of such distress being taken, and the value of the goods or chattels distrained, and such inquiry shall be taken in the manner herein-before provided upon judgment by default ; and upon the return of such inquisition the defendant shall have judgment and execution to recover against the plaintiff the arrears of rent in case the goods and chattels shall amount to the value, and in case they shall not amount to that value then for so much as the value of the said goods and chattels shall amount to, with his costs of suit in that behalf incurred ; and in case the said plaintiff shall be nonsuit after issue joined, or if the verdict shall be given against the plaintiff, then the jurors empannelled to try such issue shall, at the prayer of the defendant, inquire the amount of the rent due, and the value of the goods and chattels distrained, and the defendant shall have judgment and execution for such arrears, or so much thereof as the value of the goods and chattels distrained shall amount unto, together with his costs of suit in that behalf incurred (i).

Non-prossing
plaintiff.

(h) By section 100 of the C. L. P. Act, 1856, if the plaintiff in replevin neglects to file the summons and plaint, or a copy thereof within ten days after service, unless the time shall have been extended, or to proceed to trial within one term from that in which or the vacation of which the defence or other subsequent proceeding is filed, the defendant may proceed to enter the rules provided in cases of such default by sections 38 and 106 of the present Act.

Judgment in
the action
where
defendant
succeeds.

(i) By section 101 of the C. L. P. Act, 1856, it is enacted that in all actions for replevin of a distress made for rent, when the amount of rent in arrear at the time of making such distress shall have been ascertained as provided by the present section the defendant shall have judgment and execution to recover against the plaintiff the arrears of rent, whether the value of the goods and chattels distrained shall amount to so much or not, anything in the present Act to the contrary notwithstanding.

Accordingly, when the defendant obtains judgment for the amount of rent in arrear at the time of making the distress, he may realize the judgment in the same manner as an ordinary judgment. It is, however, only when the goods have been taken as a distress for rent that the defendant (if successful) is entitled to such judgment. In other cases the judgment which the defendant is entitled to is that given by the Common Law, viz., a return of

the goods. In both class of cases the replevin bond becomes forfeited if the plaintiff fails to satisfy the judgment; in the first class of cases because he has failed to prosecute the suit with effect, i. e. with success; in the other, because the alternative condition of the bond is that the plaintiff should return the goods; note (e), *supra*.

As the action of replevin is instituted to recover possession of the goods taken, the plaintiff in case he succeeds is entitled to nominal damages only, and cannot recover damages for the unlawful taking or vexatious mode of proceeding, and consequently if substantial damages be given the Court, will, on application, reduce them to four guineas, being the estimated expenses of the replevin bond (*Braman v. Sherman*, 2 Ir. Jur. N. S. 310; *Bowen v. Hornidge*, Arm. Mac. & O. 318; *French v. Taaffe*, 3 Law Rec. N. S. 26).

Damages
where
plaintiff
succeeds.

With respect to the power of amendment, so as to enable the said Courts and the Judges thereof to prevent the failure of justice by reason of mistakes and objections of form:

Amendment.

231. It shall be lawful for the Superior Courts of Common Law, and every Judge thereof, and any Judge sitting at Nisi Prius, at all times to amend all defects and errors in any writ, pleading, record, or other proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made in such manner as shall be thereby directed, and with or without costs, and upon such terms as to the Court or Judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made; and when such amendment shall be made at Nisi Prius or upon any inquiry, the order shall be endorsed on the abstract or writ, and all pleadings or other records of the Court which it may be necessary to amend in conformity therewith shall be amended accordingly (j).

Amendment.
15 & 16 Vict.
c. 76, s. 222.

(j) The powers of amendment conferred by the present section are very extensive. Formerly much embarrassment and frequently a miscarriage of justice arose from defects in the proceedings in an action, which, although affecting in no manner the merits of the cause, or prejudicing the opposite party, were yet of such a character as to render the proceedings erroneous or abortive. It is true that in such cases the Courts of Law possessed a limited Common Law power of amendment inasmuch as they might amend their own proceedings at any time while they were as it was called "in paper," that is, until judgment signed and during the term in which it was signed (*Tidd's Pr.*, 6th ed., p. 744; *Alder v. Chip*, 2 Bur. 756, *Cope v. Marshall*, Sayers, 285). They could not, however, in exercise of that power amend the original writ in a cause (*Crawley v. Archdall*, Vern. & Scriv. 203, 207, 208); and

Common
Law power
of amend-
ment.

the power could only be exercised by the Court or a Judge of the Court and not by a Judge of another Court sitting at *Nisi Prius*. To remedy the inconvenience arising from this state of things, acts were passed from time to time conferring powers of amendment upon the Court and a Judge. The powers so conferred were not, however, of a sufficiently extensive character, and were principally confined to giving power to the Judge at the trial to amend variances between the record and the evidence; and accordingly when the present act was passed, it was considered desirable to confer upon the Court or a Judge the power they at present possess.

Present
powers.

The power conferred by the present section is, as may be observed, very extensive. It may be exercised by the Superior Courts of Common Law, or by any Judge thereof. The defects that may be amended are defects in *any* proceeding, whether there is anything in writing to amend by or not, and the terms of amendment are wholly left to the discretion of the Court or Judge. The only clause in the section which would appear to be of a restrictive character is the provision directing that all such amendments as may be necessary for the purpose of determining *the real question in controversy* shall be made, from which it would follow, that the power of amendment does not extend so as to allow an amendment for the purpose of raising a new question between the parties. In addition to the powers conferred by the present sections powers of amendment are conferred by sect. 16, *ante*, p. 13; and by sects. 84-91, *ante*, pp. 87-95. The latter sections relate to cases where it becomes necessary to amend a misjoinder or nonjoinder of parties, and in such case it would appear that the power of amendment is derived wholly under the sections in question, and not under the present section (*Wickens v. Steel*, 2 C. B. N. S. 488, *ante*, p. 89).

When
amendment
unnecessary.

In cases of
irregularity.

Before referring to any of the cases in which the Court has exercised its power of amending the proceedings, it is well to bear in mind, that, although the proceedings be defective or irregular, it may often happen that it is unnecessary to apply for leave to amend. Thus, defects in pleading are often aided by pleading over or by verdict. See *1 Wms. Saund.*, 228, and *Mau-bourquet v. Wyse*, *Ir. R.* 1 C. L. 471. Again, if the defect in question amounts merely to an irregularity, and is not such as to render the proceedings void, the irregularity will be waived unless the opposite party apply to the Court or a Judge within a reasonable time, or if he take a fresh step after knowledge of the irregularity. (179th G. O. 1854). Thus, where the copy of the writ which was served on the 17th February, omitted the name of the Court, it was held that an application on the 2nd of April to set the proceedings aside was too late (*Woodroffe v. Dimsdale*, 5 *Ir. Jur.* O. S. 239); and see *Stephens v. O'Beirne*, 3 *Ir. C. L. R.* 66; *Bartram v. Williams*, 4 *Bing. N. C.* 301; *Thorp v. Beer*, 2 *B. & A.* 373. As to the distinction between an irregularity and a nullity, it is difficult to lay down any precise rule. When the defect in the proceedings complained of is not such as to deprive the Court of jurisdiction (see *Tisdall v. Humphreys*, *Ir. R.* 1 C. L. 1; *Martin v. Williams*, *Ir. R.* 3 C. L. 5), or does not appear upon the record of the proceedings of the Court in such a manner as to show that they are erroneous, as, for instance, when the defect complained of is a mere omission in the copy of the writ served (*Woodroffe v. Dimsdale*, *ubi supra*), it would appear that the defect is an irregularity only, and that the proceedings in the cause, and the judgment founded thereon, will not require to be amended unless application is made by the opposite party within the period of time prescribed by the 179th G. O.; and see further *Ch. Ar. Pr.* 12th ed., p. 1471.

As to the many cases in which amendments have been made under the present section, and under the previous statutory enactments authorizing amendments, it would not be possible to refer to them in detail. As a general rule the Courts are liberal in exercising the power of amendment conferred upon them, and will do so whenever it is necessary for the purpose of enabling the parties to try out the real question in controversy between them (*Webster v. Emery*, 10 Ex. 901); and leave to amend will not be refused merely on account of the supposed hardship or impropriety of the action (*Doe v. Edwards*, 1 M. & R. 321).

The allowance of amendments under this section rests, however, in the discretion of the Court or Judge, and it is questionable whether in any case such allowance is a matter of strict right. If it is, it is so only in cases where a pleading, by reason of some informality, does not raise the question intended to be raised, and it is therefore entirely a matter of discretion to allow an entirely new pleading, raising a question not already upon the record. Thus in *Ritchie v. Van Gelder*, 9 Exch. 762, after a plea of *never indebted* had been pleaded, the Court refused permission to allow a plea of illegality of consideration to be added; and see further *The Times Assurance Co. v. Hawke*, 28 L. J. Ex. 317; *Brennan v. Howard*, 41 H. & N. 138, and *Tennant v. Orr*, 9 Ir. Jur. N. S. 131, and the cases referred to *infra* under the head of amendment of pleadings. For the same reason the Court will not allow amendments to be made so as to try a question other than the question in controversy between the parties (*Seagrave v. Union Marine Insurance Co.*, L. R. 1 C. P. 305; *Wilkin v. Reed*, 15 C. B. 192; *Lucas v. Tarleton*, 3 H. & N. 116). Neither will an amendment be allowed if the result of doing so would be a surprise on either party (*Adams v. Atkins*, 9 Ir. C. L. R. Ap. 18). To allow an amendment under such circumstances would be in fact to defeat the main object of the system of pleading. Thus, in *Bradworth v. Foshaw*, 10 W. R. 760, the plaintiff in an action of tort having in his declaration stated a cause of action which his evidence failed to sustain, was not permitted to amend the declaration by stating a different case of tort.

Where, however, the proposed amendment is not open to any of the objections just mentioned, it is in practice a matter of course if not a matter of right to allow it; and the amendment may be made at any stage of the cause, and in any of the proceedings. Thus leave will be given to amend omissions in the summons and plaint or copy served, such as in the name of the Court, or in the venue in the margin of the copy (*Tuckey v. M'Curthy*, 7 Ir. C. L. R. 289; *Barrett v. Wilson*, 7 Ir. Jur. O. S. 39; *Cunningham v. O'Gorman*, 4 Ir. Jur. N. S. 221; and see *ante*, p. 13, note (b), as to amending the copy served). An omission in the date of the writ, such as of the day of the week of issue, may be amended (*Worlington v. Meade*, 6 Ir. Jur. O. S. 246); but the Court cannot antedate a writ even to prevent the operation of the Statute of Limitations (*Clark v. Smith*, 2 H. & N. 753). So also errors in the names, residences, and descriptions of the parties have been amended (*Fowler v. Barrington*, 4 Ir. Jur. O. S. 170; *Stephens v. O'Beirne*, 3 Ir. C. L. R. 66, *ante*, p. 7). It is true that in such a case leave to amend may be refused, but this is so only where the plaintiff has been guilty of gross neglect (*Curry v. Johnson*, 2 Ir. C. L. R. 641); and if the omission or error be merely technical and not calculated to mislead, leave to amend may be unnecessary (*Kelly v. Brophy*, 5 Ir. C. L. R. 279; *Dunne v. Gray*, 6 Ir. Jur. O. S. 138; and see *Glennison v. Bellew*, 7 Ir. C. L. R. 215).

Rests in discretion of the Court or Judge.

In what proceedings allowed.

Omissions in summons of plaint. Name of Court venue.

Date.

Names, &c., of parties.

- Prayer for damages.** Where a blank is left in the prayer for damages, leave to supply the omission may be granted both at the trial or before or after (*Buller v. Tighe*, 3 Law Rep. O. S. 63; *Lockwood v. Cross*, 2 Leg. Rep. 388); the amount prayed for may also be increased (*Cloran v. Cogan*, 2 Ir. L. T. 212); and this has been allowed to be done even after verdict (*Connolly v. Callaghan*, Arm. Mac. & O. 345); and leave has been given in an action of replevin to amend the prayer for judgment by introducing a prayer for the return of the goods (*Hudson v. Rogers*, 11 Ir. C. L. R. Ap. 9). The summons and plaint or other subsequent pleading will be allowed to be amended by adding the name of the attorney or of counsel (*Palliser v. Furlong*, 7 Ir. Jur. O. S. 32), but if it be sought to amend a pleading by adding counsel's signature it must be satisfactorily shown that the draft was submitted to him, and that he by mistake omitted to sign it (*Harrison v. Kenny*, 11 Ir. L. R. 53).
- Particulars.** The endorsement of particulars upon the plaint may be amended. In *Gordon v. Hassard*, 6 Ir. C. L. R. 135, the Court upheld amendments made at the trial, whereby a sum claimed originally upon an account stated was allowed to be sued for and recovered under a count for goods sold and delivered, and the endorsement of particulars was accordingly altered, and see also *Savage v. Canning*, Ir. R. 1 C. L. 434.
- Parties.** Amendments by adding or striking out parties to an action are provided for by ss. 84-91, *ante*, pp. 87-96; and the amendment must be made in the manner there prescribed (*Wickens v. Steel*, 2 C. B., N. S. 488). It will be seen by referring to those sections and the notes thereto, that the powers of the Court or a Judge at Nisi Prius to strike out or add new parties is very extensive. It does not appear, however, that an amendment can be made which will have the effect of substituting an entirely new plaintiff for an old one (*Clay v. Oxford*, L. R. 2 Ex. 54), although in an action of ejectment an amendment of such a description does appear to have been made (*Blake v. Done*, 7 H. & N. 465). It would also appear to be doubtful whether an amendment can be made by which an action brought by plaintiffs in a representative capacity will be changed into an action by them in their personal capacity (*Bolingbroke v. Kerr*, L. R. 1 Ex. 222). So, also, no amendment can in general be made at the trial by which a new defendant is added (*Garrard v. Ginbellei*, 11 C. B., N. S. 616; *Pryor v. Local Board of Ham*, 15 L. T., N. S. 250); although in an extreme case an amendment was made by which the original defendant was struck out and a new defendant substituted at the trial (*Podmore v. Schmidt*, 17 C. B., N. S. 725); *sed de hoc quaere*; and see further the sections referred to.
- Endorsement of service.** No amendment can be made, as a general rule, in the endorsement of service upon the summons and plaint directed by section 31, *ante*, p. 25.
- To save Statute of Limitations.** The Court will always be the more willing to amend when the consequence of a refusal on their part to allow the amendment would be that the party would be barred by the Statute of Limitations (*Lalor v. Bland*, 8 Ir. C. L. R. 115).
- Other proceedings.** The power of the Court to amend an original writ is not confined to writs of summons and plaint; thus, a writ of *capias ad respondendum* may be amended (*Page v. Williams*, 1 Ir. C. L. R. 499); or a *scire facias* (*Thorpe v. Hook*, 1 Dowl. 501).
- Pleadings.** Amendments are more frequently necessary in the case of the pleadings in the action than in any other of the proceedings. The necessity for them arises chiefly in two ways. It may be that the evidence forthcoming in a

case will not support the issue raised by the pleadings as they stand, although if the pleadings were amended the evidence would be sufficient to establish a good ground of action or defence; or it may be that through inadvertence or mistake the pleadings necessary to raise the question between the parties are wholly wanting.

In the first class of cases referred to, the Judge at the trial has full power to amend the variance between the record and the evidence in the manner pointed out by the present section. As to when a variance arises reference may be made to the notes to *Bristow v. Wright*, 1 Sm. L. C. 5th Ed., p. 570, from whence it will appear that, if the whole of an averment may be struck out without destroying the plaintiff's cause of action or the defendant's ground of defence, it is not necessary to prove the averment, but if, on the other hand, the whole of the averment cannot be struck out without getting rid of an essential part, the averment must be proved in its entirety unless leave be granted to amend. When a variance does arise, leave to amend as before mentioned will be readily granted, provided the amendment is such as to enable the parties to try out the real question in controversy between them; but it will not be granted when its allowance would operate as a surprise on the opposite party, or would raise a question not previously in controversy between the parties, or if the allowance would have the effect of rendering the pleading fairly open to demurrer, (see *Ritchie v. Van Gelder*, *ubi supra*, and the other cases referred to there). When necessary, leave will be given not merely to amend the pleadings but the endorsement of particulars as well (*Gordon v. Hassard*, 6 Ir. C. L. R. 135; *Canning v. Savage*, Ir. R. 1 O. L. 434); or even the prayer for judgment (*Connolly v. Callaghan*, Arm. Mac. & Og. 345; *Cloran v. Cogan*, 2 Ir. L. T. 212). As to the terms of amendment see *infra*.

In the other class of cases referred to, where permission is sought to add a new count or defence, leave will also be readily granted by the Court or a Judge in chamber or at Nisi Prius in a proper case. Thus, leave to add counts for goods bargained and sold (*Scriber v. M'Cann*, 10 Ir. Jur. N. S. 114); and even an entirely new cause of action (*Smith v. Delacherois*, *ib.* 357; *Crooke v. Murray*, 6 Ir. Jur. N. S. 391; and see *Leo v. Kearns*, 9 Ir. Jur. N. S. 318); has been granted, and the defendant refused costs unnecessarily incurred in opposing the application (*Smith v. Delacherois*, *ubi supra*, and see *infra* under the head of terms of amendment).

The propriety of an amendment introducing an entirely new cause of action has, however, been questioned (*Boucher v. Murray*, 6 Q. B. 362; *Brashier v. Jackson*, 6 M. & W. 549). In *Nash v. Macken*, Ir. R. 5 C. L. 51, an action having been brought upon the money counts, to which a defence was pleaded that a bill was given for the amount and had been lost, the Court allowed a count on the bill to be inserted in order that the plaintiff might avail himself of the provisions of section 90 of the C. L. P. Act, 1856. Compare with this case *Ellston v. Deacon*, L. R. 2 C. P. 20, in which case the action having been brought upon a bill of exchange the plaintiff was allowed after trial to add a count upon the consideration and to enter up judgment for the sum due and the costs of the action. So, also, the defendant has been allowed to add new defences to those already pleaded, as for instance a defence of justification in an action for libel (*Hogan v. Sutton*, 2 Ir. L. T. 24); or a traverse (*Shane v. Needham*, 8 Ir. Jur. N. S. 414), and leave has been given where the defence sought to be pleaded was the Statute of Limitations (*Archbold v. Howth*, 15 Ir. C. L. R. 420), and the action one of seduction

(*Bone v. Smith*, Ir. R. 2 C. L. 244); and see *Hall v. Devereux*, Ir. R. 4 C. L. 265, 268). In *Brown v. Julian*, 1 Ir. L. T. 156, leave was given to withdraw the defences pleaded and pay money into Court. As to the time within which the defendant must plead after the making of the amendment see section 44, *ante*, p. 41.

After demurrer filed.

Leave to amend pleadings which are defective or demurrable will also be granted almost as of course before the argument of a demurrer upon proper terms (*Murphy v. Lancashire & Yorkshire Railway Co.*, 8 Ir. Jur. N. S. 414; *Savage v. Usher*, Batty, 640, and see *ante*, p. 79). In *Tomlinson v. Bolland*, 4 Q. B. 643, a party was allowed to amend after demurrer upon the payment of nominal costs.

Leave, moreover, will be granted upon terms to amend or add a new defence after an abortive trial (*Mitchell v. Rodgers*, 3 Ir. L. T. 136 referred to *infra*, and cf. *Morris v. Hartley*, 7 Ir. C. L. R. 17).

In all such cases, however, it should be remembered that the granting of leave is in the discretion of the Court, and if the granting of permission is not conducive to the justice of the case it will not be granted (*Sims v. Thomas*, 3 Ir. L. R. 415). An affidavit of merits may also be required (*Bishop v. Wigram*, 7 Ir. Jur. O. S. 22). As to the power of the Judge at Nisi Prius to allow a plea to the jurisdiction to be added see *Gray v. Raper*, L. R. 1 C. P. 694.

Demurrer books.

In addition to the several proceedings already mentioned the Court possesses a power of amendment over all the other proceedings in the cause. Thus, the demurrer books will be ordered to be amended when they differ from the pleading upon the file (*Baylan v. Dublin & Belfast Railway Co.*, 4 Ir. C. L. R. 172, *ante*, p. 76). Orders have even been made after the discharge of the jury amending a special verdict, and entering a verdict upon formal issues (*Fitzgerald v. Roddy*, 6 Ir. Jur. O. S. 268; *Quin v. The National Assurance Co.*, 2 Ir. L. R. 37). As to amending a bill of exceptions, see *Thelwall v. Yelverton*, 7 Ir. Jur. N. S. 260; *Whaley v. Carlisle*, 17 Ir. C. L. R. 792; *Mersey Docks v. Penhallow*, 7 H. & N. 341. The *postea* may also be amended, but the application for that purpose should be made to the Judge who tried the cause (*Low v. Russell*, 6 Ir. C. L. R. 536; *Anon.*, 3 Ir. C. L. R. 119); or the amendment may be made by the Court on a certificate of the Judge (*Powell v. Atlantic Steam Co.*, 11 Ir. C. L. R. 347). The Judge in making such amendment is at liberty to have recourse to such evidence as he thinks fit (*Baker v. Lawrence*, 22 L. T. N. S. 608). So, also, the record may be amended by entering any necessary suggestions thereon, even after judgment has been entered up (*Whalley v. Masse-reene*, 9 Ir. Jur. N. S. 417, referred to *ante*, p. 183). As to amending an order of reference, see *Vanderbyl v. McKenna*, L. R. 3 C. P. 252, whence it appears that an order of reference made by consent cannot be amended, unless there has been an omission on the part of the officer, or by some accident or mistake the order is not in accordance with the intention of the parties, or some fraud has been practised.

Order of reference.

After judgment.

After judgment has been signed and enrolled the judgment itself and the previous proceedings may be amended by alterations in the names of the parties (*O'Connell v. O'Connor*, Bl. D. & O. 95; *Wilcox v. Lowe*, 6 Ir. Jur. O. S. 101); or, if the judgment has been recently entered, by an alteration in the amount (*White v. White*, 6 Law Rec. N. S. 397; *Anon.*, Bl. D. & O. 110), or in the date (*Keough v. Henry*, 4 Ir. Jur. N. S. 245; *Wilcox v. Lowe*, 3 Ir. C. L. R. 470). In all such cases the Court must, however, be satisfied that

the rights of third parties will not be interfered with (*Elliott v. Elliott*, 7 Ir. Jur. O. S. 168), and where an application was made to amend the judgment by increasing the amount leave would in general not have been given under the old practice. Thus, where by mistake, a judgment was entered up in the amount which a bond had been given to secure, and not in the penal sum, the Court refused leave to amend (*Cromie v. Brown*, 4 Ir. L. R. 219). The course to be adopted in such cases was to apply for leave to vacate the judgment and mark a new one (*Cumming v. Brown*, 2 Leg. Rep. 143). When a joint judgment had been marked on a bond and warrant signed by several parties, one of whom was an infant, the Court allowed the judgment to be amended by striking out the infant's name (*England v. Chapman*, 5 Ir. Jur. N. S. 291).

An unsealed writ of *fi. fa.* was allowed to be amended by the addition of the seal upon terms (*Callaghan v. Brodrick*, 1 Ir. C. L. R. 364), and see further, as to amending an execution, *Cobbett v. Wheeler*, 4 L. T. N. S. 285; *Newnham v. Law*, 5 T. R. 577, *ante*, p. 183, in which case a writ of *ca. sa.* was allowed to be amended after execution, by striking out the name of a deceased co-plaintiff who had died before judgment.

Executions.

An application for leave to amend should be made within a reasonable time, or the delay may be a reason for refusing leave (*Meredith v. Taylor*, Cr. & Dix. Ab. Not. Cas. 615; *Wood v. Grimwood*, 10 B. & C. 689). When an amendment is made, the amended proceeding continues as of the same date as before the amendment was made, as, for instance, when new parties are added, or an additional defence pleaded (*Coombes v. Bristol & Exeter Rly. Co.*, 1 F. & F. 206; *Short v. Simpson*, L. R. 1 C. P. 248, 250). If made before service, the plaintiff may, as a general rule, obtain leave to amend as he may be advised; and when leave to amend is given in that form, whether before or after service, the plaintiff may, as part of the amendment, change the venue originally selected (*Costello v. Woods*, 11 Ir. C. L. R. Ap. 31); and see *Bramble v. Knox*, 3 Ir. L. T. 726. By the 40th G. O., 1854, it is provided, that no amendment whatever of any writ or pleading shall be allowed, except by consent or order of the Court on motion, unless authorized by sects. 87 and 89 of the present Act, and accordingly when the writ has been served, no amendment will in general be allowed without notice to the opposite party. Where, however, the defendant showed by his acts that he was aware of the residence of the plaintiff's attorney, though the same was not mentioned in the summons and plaint, the Court allowed the omission to be amended, but required the writ to be served over again (*Dempster v. Vernon*, 6 Ir. Jur. N. S. 366). As to the amendment of pleadings before argument, see *ante*, p. 79, note (v). Amendments may of course be made at the trial by the Judge, but some doubt seems to exist as to the right of a party to appeal against an order giving liberty to amend so made (*Tennyson v. O'Brien*, 5 E. & B. 497). There appears, however, to be no doubt that if an amendment be allowed, the party opposing the amendment may have the decision of the judge reviewed by the Court, and if it should be considered that the discretion of the Judge was wrongly exercised, a new trial will be granted (*Davis v. Reeves*, 5 Ir. C. L. R. 533, 535; *Boucher v. Murray*, 6 Q. B. 362; *Brashier v. Jackson*, 6 M. & W. 549). Where the Judge's report states that an amendment was made at the trial by consent, the Court will not listen to an affidavit stating it was not so made (*Atkinson v. Mills*, 8 Ir. Jur. N. S. 92). Where, however, the Judge refuses to make an amendment, it has been laid down that the Court will not interfere with the exercise of his discretion (*Holden v. Ballantyne*, 29 L. J. Q. B.

When application to be made.

Notice necessary.

Appealing from order of Judge at trial.

148; and see *Ward v. M Kelsey*, 7 Ir. Jur. N. S. 409). In *Connolly v. Hayes*, 2 Ir. L. T. 212, the Judge at the trial having offered to allow the plaintiff to amend upon the terms of paying certain costs, which terms were refused, the Court refused to grant a conditional order for a new trial. Notwithstanding, however, the cases referred to, it would appear that the Court may review the manner in which the Judge has exercised his discretion in refusing to make the amendment (*Brennan v. Howard*, 1 H. & N. 138, 140; *Leo v. Kearns*, 9 Ir. Jur. N. S. 318); and independent of directly reviewing his refusal to amend, there would appear to be no objection to the Court, in the exercise of its inherent control over its own proceedings, making any amendment which the circumstances of the case render fit, and at the same time directing a new trial, see *Wilkin v. Reed*, 15 C. B. 192, 200; *Crawford v. Cocks*, 6 Ex. 287; *Brennan v. Howard*, *ubi supra*; *Parsons v. Alexander*, 5 E. & B. 263. The Court will not, however, review an amendment made by the Judge in the *postea*, or in a bill of exceptions (*Daintry v. Brocklehurst*, 3 Ex. 691; *Mersey Docks v. Penhallow*, 7 H. & N. 341).

After error brought.

As before mentioned the Court may, after the trial, amend the proceedings, including the finding upon a special verdict. When error is brought, the Court below may, notwithstanding, amend; and in *Wilkinson v. Sharland*, 11 Ex. 33, the Court allowed the declaration to be amended after error was brought, by inserting the words "money payable by the defendant to the plaintiff." Previous to the Statute, after error brought, those things were amendable which were amendable before error brought, so long as diminution might be alleged, and a *certiorari* awarded (8 Co. Rep. 162 a. *Usher v. Dansey*, 4 M. & S. 94); thus, a judgment against an executor *de bonis propriis*, has been amended by changing it to one *de bonis testatoris* (*Green v. Rennett*, 1 T. R. 783). When an amendment is allowed to be made, even after error brought, the Court of Error will not review the propriety of the amendment (*Mellish v. Richardson*, 7 B. & C. 819, 1 C. & F. 224; *Scales v. Cheese*, 1 D. & L. 657). The application for leave to amend should in such cases be made to the Court below, and not to the Court of Error (*Wilkinson v. Sharland*, *ubi supra*).

Terms of amendment.

As regards the terms of amendment, it is difficult to lay down any precise rule, the matter being one depending upon the circumstances of each particular case, and upon the discretion of the Court or Judge to whom the application is made. As a general rule, however, it may be laid down, that the Court will not allow any additional expense to be thrown upon the opposite party by reason of an amendment (*Smith v. Brandram*, 2 M. & G. 250, per Tindal, C. J.); and the costs therefore of all matters rendered unnecessary or useless, and all other costs properly incurred by reason of the error sought to be amended, will generally be ordered to be paid (*Little v. The Midland Great Western Railway Co.*, 6 Ir. Jur. O. S. 291; *Keatinge v. Johnson*, 7 Ir. Jur. O. S. 148). In *Mitchell v. Rodgers*, 3 Ir. L. T. 136, leave having been applied for to add an additional defence after an abortive trial, the leave was granted upon the terms of the defendant paying the costs of the former trial. In a case of *Gallagher v. Sweeney*, referred to in that case (but not reported), the Court of Common Pleas, under similar circumstances, appear to have allowed the defendant to amend upon the terms of the costs of the former trial being a portion of the plaintiff's costs in the cause, but in no case the defendant to get any portion of the costs thereof. And see also, as to the costs of amendment after trial, *Goucher v. Goucher*, 1 Ir. C. L. R. 663, and *Ellston v. Deacon*, L. R. C. P. 22, in which

Costs.

latter case the plaintiff was allowed after trial to add a count and enter judgment for the sum due and the costs of the action. So, also, if the opposite party would be prejudiced by the proposed amendment in other respects, the applicant will be put under terms, as, for instance, to accept short notice of trial and the like. As to the time within which a defendant must plead after the making of an amendment, see sect. 44, *ante*, p. 41.

On the other hand, when leave to amend is granted, the Court will not as a general rule compel the party applying to pay any other costs than those above mentioned. Thus, where a plaintiff or a defendant applies for leave to amend his pleading, and has previously tendered a proper consent offering all the terms which the Court considers should have been tendered, the opposite party will not get the costs of appearing upon the motion rendered necessary by his refusal to sign the consent, unless the applicant has been guilty of a default or act of negligence which the Court thinks it fit to punish by making him pay costs (*Smith v. Delacherois*, 10 Ir. Jur. N. S. 357; *Tormey v. Tormey*, 7 Ir. Jur. O. S. 138; *Corcoran v. Wills*, 5 Ir. Jur. O. S. 249; *Watson v. Jones*, *ib.* 117; *Stow v. Archer*, 2 Ir. Jur. N. S. 367); but see *e contra*, *Harris v. Jevors*, Ir. R. 2 C. L. 670. Where the opposite party cannot have been misled or prejudiced by the error or omission sought to be amended, leave to amend will be given without payment of costs (*Bush v. Curran*, 9 Ir. C. L. R. Ap. 28), and in such cases the defendant may, moreover, be put under terms of taking short notice of trial (*Cunningham v. O'Gorman*, 4 Ir. Jur. N. S. 221); and see *Scriber v. M'Cann*, 10 Ir. Jur. N. S. 114. In *Tomlinson v. Bollard*, 4 Q. B. 643, the defendant was allowed to amend after demurrer upon the payment of nominal costs.

When leave to amend is given upon payment of costs, the payment of them is a condition precedent to the making of the amendment (*Levy v. Drew*, 5 D. & L. 307). In such cases, however, the party applying need not act upon the order, and if he do not, the opposite party will not be entitled to the costs (*Black v. Sangster*, 1 C. M. & R. 521; *Field v. Sawyer*, 6 C. B. 71), unless the order provides that the applicant shall pay the costs, even though he do not avail himself of the order.

As to supplying an accidental omission to provide for the costs of the day in an order made by the Judge at the trial giving liberty to amend, see *Skinner v. London and Brighton Railway Co.*, L. M. & P. 189.

With respect to the general regulation of business in the said superior Courts of Law :

*Regulation of
Business.*

Holidays.

232. The following, and none other, shall be observed and kept as holidays in the said superior Courts and the offices thereof, and the Court of Exchequer Chamber, and in the office of Registrar of Judgments ; that is to say, every *Sunday*, *Christmas Day*, and the seven days following that day, *Good Friday*, *Easter Eve*, *Monday* and *Tuesday* in *Easter week*, *Whit Monday* and *Whit Tuesday*, any day appointed for a public fast or thanksgiving, and when they do not occur in Term Time the day appointed to be kept as the birthday and the day of the accession of Her Majesty the Queen or of any of her successors ; and the said holidays shall not be reckoned

See R. G. H.
T. 1853, rr.
173-175.

or included in any notices or other proceedings, except notices of trial and notices of inquiry, in any of the said Courts (*k*); and *Sunday* shall not be reckoned or included in any notice or proceeding whatsoever; and where the last last day included in any such notice of trial or notice of inquiry shall happen to fall on any of the days hereby appointed to be observed and kept as holidays, in such case the following day, or, when there shall be consecutive holidays, the day following the last of such holidays, shall be considered as the last of such days; and the days from and including the first day of *August* to the twentieth day of *October* inclusive, in each year, shall not be reckoned days within which any summons and plaint, defence, or other pleading should be filed, nor shall any such pleading be filed or received upon such days except a plea of confession or consent for judgment (*l*).

When the holidays are not to be reckoned.

(*k*) The holidays in question are not to be reckoned in notices or other proceedings when time is to be computed by days, but when time is to be computed by months the holidays cannot be excluded. The 84th G. O. 1854, requires a party excepting to furnish a draft bill of exceptions ten days before the term succeeding the trial, and accordingly on the principle of excluding the holidays mentioned in the above section, it has been held that a bill of exceptions furnished on the 29th December is too late (*White v. Tyrrell*, 5 Ir. C. L. R. 278; *Hassard v. Caulfield*, 7 Ir. Jur. O. S. 141).

By the 6th G. O. 1854, it is provided that in the computation of time it shall in all cases be reckoned exclusive of the first, and inclusive of the last day, unless the last be a holiday under the present Act, when the following day shall be included. It should, however, be remembered that when the time for doing an act is prescribed by statute it cannot be extended or shortened by a general order (*Flower v. Bright*, 2 John & Hem. 590; *Evans v. Jones*, 2 B. & S. 45); and see further the note to the General Order referred to as to the manner of computing time.

As to notice of trial, see *ante*, p. 110.

The long vacation.

(*l*) The days in question are notwithstanding to be included in the period of six months, after the expiration of which the plaintiff cannot proceed to file a defence unless he has filed the summons and plaint, and served notice of filing before they have expired (*Mullen v. Bonjor*, 5 Ir. C. L. R. 475). As to the filing of the summons and plaint and defence, see *ante*, sections 37, 38, 39, and 43.

When the action is brought under the Summary Procedure on Bills of Exchange Act (Ireland) 1861, the days for appearing and filing a defence run in vacation as well as term time without excepting the days above mentioned, 25 Vict. c. 23, *post*, in the Appendix.

Except where otherwise specially provided, the days above mentioned are to be reckoned in all proceedings, and therefore, the month within which a rule for the costs of the day for not proceeding to trial may be entered, pursuant to the 103rd section, *ante*, is to be reckoned, inclusive of them, and after its expiration the Court has no authority to allow it to be entered

Entering rule for costs of the day.

(*M'Kinney v. Reynolds*, 6 Ir. C. L. R. 133). By section 192, *ante*, it is provided that rules or orders may be made, entered, or issued, on or as of any day except the days appointed to be kept as holidays, and the days limited for compliance with them shall run in term as well as in vacation, except the holidays and the days from 1st Aug. to 20th Oct.

233. It shall be lawful for the Judges of the said Courts, or any seven or more of them, whereof two shall be chief Judges, from time to time to make all such general rules and orders for the effectual execution of this Act, and for establishing a simple code of practice, pleading, and evidence in the said Courts, and in the Court of Error, in accordance with the intention and object of this Act, and for apportioning the costs of issues, and for fixing the costs to be allowed for and in respect of the matters herein contained, or prescribed by such General Orders, and the performance thereof, and for the purpose of enforcing uniformity of practice and pleading in the said Courts and the offices thereof, and of ensuring, as far as may be practicable, an equal division of the business amongst the said Courts, as in their judgment shall be necessary or proper, and for that purpose to meet from time to time as occasion may require; and all such rules and orders as they shall so make shall be valid and effectual, and shall be observed in each of the said Courts and the offices thereof, until varied or altered by the like authority, anything in this Act to the contrary notwithstanding; and any expenses which the Judges shall certify (as now required with reference to incidental expenses) to have been properly incurred in giving effect to the provisions of this Act shall be charged and paid in like manner and as part of the incidental expenses of the said Courts: provided that nothing herein contained shall be construed to restrain the authority or limit the jurisdiction of the said Courts, or the Judges thereof, to make rules or orders, or otherwise to regulate and dispose of the business therein.

General rules may be made by the Judges. 15 & 16 Vict. c. 76, s. 223.

234. The Nisi Prius Courts of the said superior Courts of Common Law sitting at *Dublin* shall continue to be consolidated, and there shall be but one common Court of Nisi Prius for the trial at *Dublin* of issues of fact arising in any of the Courts, except as herein-after provided, which Court of Nisi Prius shall consist of one Judge or Baron of either of the said superior Courts, to be chosen for that purpose by the said Judges and Barons according to such arrangements as they

Consolidated Court of Nisi Prius for the trial of issues arising in any of the superior Courts.

shall think proper, and in such order of rotation that each Court shall by one of its Judges or Barons take the duty in turn by terms, and all jurors, witnesses, and other persons shall be summoned or required to attend, and shall give their attendance at or for the trial of any cause depending in any such Court, before such Judge as shall be sitting for the trial thereof by virtue of this Act: provided always, that all causes intended to be tried at any sittings at Nisi Prius at *Dublin* shall be entered for trial with the Registrar of the chief Judge of that Court of which one of the Judges is to sit, and all other process and proceedings for or relating to the trials thereof, shall be made and issued as herein-before required, but nevertheless the trial of every cause which shall be tried by virtue of this Act shall be entered and made of record, as having been had and made before the Judge before whom such cause shall happen to have been actually tried (*m*).

Consolidated
Nisi Prius
Court.

(*m*) The Consolidated Nisi Prius Court was first created by 13 Vict. c. 18, s. 27. As to the class of cases which may be disposed of in the Consolidated Nisi Prius Court see s. 237, *post*. The docket and abstract of Nisi Prius must in every case be lodged with the Registrar of the Court, in the same manner as in the case of an ordinary trial at Nisi Prius.

Unlike the sittings after Term, each day of the Consolidated Nisi Prius sittings is to be considered as a distinct day (*Johnson v. Budge*, 3 Dowl. 207, *ante*, p. 187); but if notice of trial is served for a particular day and postponed, the trial is to be considered as taking place on the day for which the notice was served. If a case remains undisposed of at the end of the Consolidated Nisi Prius sittings, it will be transferred into the after sitting list, s. 235, *post*. Where a plaintiff served notice of trial for the Consolidated Court, and the defendant made no objection to the notice, but appeared at the trial, and objected that the Judge had no jurisdiction to try the case, the Court (the last day for serving notice of trial having passed) allowed a notice of trial served on that day to stand for the sittings after Term (*Waldron v. Parrott*, 8 Ir. C. L. R. Ap. 50).

Where a plaintiff served notice of trial for the Consolidated Nisi Prius Court in a case not properly triable therein, it was held that a rule might notwithstanding be entered, under s. 105, *ante*, for the costs of the day for not proceeding to trial (*Murphy v. M' Cay*, 6 Ir. Jur. O. S. 312).

Such Court
to sit conti-
nuously.

235. Such Consolidated Nisi Prius Court shall sit continuously, or by adjournment, as occasion may require, on the second day of each term, and thence continuously until the end thereof, or so much longer as may be necessary for the completion of any trial then in progress before the said Court; and notice of trial may be served for any day within the said period, subject, however, to such regulations as to the class

of cases to be tried in the said Court, or otherwise, as is herein-after expressed, or as the Judges, or any seven of them, of whom two shall be Chief Judges, may by any general order make from time to time in that behalf: provided always, that nothing herein contained shall be construed to interfere with the duty of the Chief Judge of each Court, as now discharged, of sitting after Term for the trial of issues at Nisi Prius, but that each of the said Chief Judges, or some other Judge of the Court in his stead, shall, notwithstanding the sittings at Nisi Prius herein provided, sit after Term as heretofore, for the trial of any issues at Nisi Prius arising in his Court which shall be entered as heretofore for such after sittings; and provided also, that if any issue or issues entered for trial in the said Consolidated Nisi Prius Court shall remain undisposed of at the termination of the sittings of the said Court for any term, the same shall be transferred to and be deemed to have been entered for such after sittings, and shall be taken up and disposed of respectively by the chief Judge of the Court, in which such issues respectively shall have arisen as if the same had been originally entered for such after sittings.

236. The duty of attending such Consolidated Nisi Prius Court as Clerk of Nisi Prius shall be discharged by the Town Registrar of the Chief Justice or Chief Baron of the Court to which the Judge sitting at Nisi Prius shall belong; and if it shall happen that such sitting at Nisi Prius shall not have terminated at any time when the Chief Justice or Chief Baron shall require the attendance of his said registrar for the purpose of such Nisi Prius sittings in his own Court as aforesaid, then and in such case it shall be lawful for the said Nisi Prius Judge to require the attendance of any of the assistants or clerks belonging to his Court who can at such time be spared from his office duties, to act as his temporary clerk of Nisi Prius; and the Lords Chief Justices and Chief Baron, or any two of them, shall, in case of a vacancy in the office of crier, appoint a fit and proper person to act as crier of the said Nisi Prius Court, who shall be paid such salary as the Commissioners of Her Majesty's Treasury shall direct, the same to be charged and included in the quarterly accounts of incidental expenses of the said Courts respectively, in like manner and proportions as the salary of the Court keeper of the Nisi Prius Court and other incidental expenses common to the three Courts are now charged (n).

Officers of
Consolidated
Nisi Prius
Court.

Registrar.

(*) By 21 & 22 Vict., c. 52, provision is made for the appointment of a permanent registrar or clerk of nisi prius to discharge the duties created by the above section, and by s. 5 of the C. L. P. Act, 1856.

Cases to be
tried in
Consolidated
Nisi Prius
Court.

237. The following shall, until otherwise provided by any General Order made as aforesaid, be the class of cases to be tried in the Consolidated Nisi Prius Court :

Actions for rent; actions on bills of exchange and promissory notes; actions of debt upon and to revive judgments; actions for use and occupation; goods sold and delivered; goods bargained and sold; work and labour; money lent, money paid, money had and received, and on account stated; ejectments for non-payment of rent, and against overholding tenants whether on notice to quit or otherwise (o).

Cases
triable in the
Court.

(o) No General Order has been made extending the class of cases which may be tried in the Consolidated Nisi Prius Court; but by a General Order of the 18th January, 1862, it is ordered that no certificate of counsel shall be requisite in order to enable plaintiffs to have cases coming within the terms of the above section tried in the Consolidated Nisi Prius Court; and that in addition to the cases specified in the above section all cases may be tried in that Court which shall be ordered to be tried therein by any of the three superior Courts, or any Judge thereof. Provided, however, that nothing contained in said order shall be deemed to interfere with the discretion of the Judge sitting in that Court to postpone the trial of any case to the after sittings, on his being satisfied that it cannot be conveniently tried in that Court.

In *Waldron v. Parrott*, 8 Ir. C. L. R. Ap. 50, it was questioned whether a Judge sitting in the Consolidated Nisi Prius Court has jurisdiction to try an issue when a judgment creditor proceeds against the garnishee under s. 66 of the C. L. P. Act, 1856.

An ejectment on the title cannot be tried in that Court (*Murphy v. M'Cay*, 6 Ir. Jur. O. S. 312).

Judges of
either Court
may do
business
depending in
any of the
Courts. See
1 & 2 Vict.
c. 45.

238. Every Judge of the said Superior Courts of Common Law shall have full power and jurisdiction to sit in *Dublin*, as well in term as in vacation, for the trial of issues in fact arising in any of the said Courts, and to transact in chamber or elsewhere such business depending in any of the said Courts as relates to matters over which the said Courts have a common jurisdiction, and as may, according to the course and practice of the Courts, be transacted by a single Judge (p).

Jurisdiction
of Judge in
chamber.

(p) It is not easy to lay down any precise rule as to the class of cases which according to the course and practice of the Courts may be transacted by

a single Judge. Motions for a new trial, demurrers, law arguments, and the like, can only be heard by the Court. On the other hand, motions to change the venue, to set aside proceedings, and the like, may be entertained by a single Judge.

As to the power of a Judge in chamber to hear a motion under sect. 89 of the Common Law Procedure Act, 1856, for the purpose of waiving temporary bars, see *Eagar v. Maunsell*, Ir. R. 1 C. L. 159. In *Goggin v. O'Driscoll*, 1 Ir. L. T. 64, it was held by *Fitzgerald, J.*, that a Judge sitting in chamber has jurisdiction to hear a motion to make absolute a conditional order to proceed when more than two years had elapsed since the taking of any step in the cause (see the 178th G. O. 1854); and cf. *Lawrence v. Hogben*, 26 L. J. Ex. 55, *Palmer v. Justice Assurance Society*, 6 El. & Bl. 1015.

As to appealing from an order made by a Judge in chamber, see *ante*, p. 4.

239. The said superior Courts shall and may, at their discretion, hold sittings in banco in time of vacation for the purpose of disposing of business therein pending and undecided in such Courts respectively, and such sittings in vacation may be holden by virtue of a rule or order of the said Courts respectively, to be made in or out of Term, whereof a week's notice (in such form as the said Courts respectively shall direct) shall be published in the *Dublin Gazette*, and affixed in some conspicuous place at the entrance of such Court respectively making such order; and that all judgments to be pronounced at such sittings in banco, and all rules and orders in respect thereof to be made by virtue of this Act, shall have the same effect to all intents and purposes as if they had been pronounced or made in Term time (q).

Courts may hold sitting in vacation.

(q) This section has been repealed by sect. 96 of the Common Law Procedure Act, 1856.

240. Such new or altered writs and forms of proceedings may be issued, entered, and taken as may by the Judges of the said Courts, or any seven or more of them, of whom two shall be Chief Judges, be deemed necessary or expedient for giving effect to the provisions herein-before contained, and in such forms and such variation from the forms in the Schedule B. to this Act annexed as the Judges of such Courts respectively shall from time to time think fit to order; and such writs and proceedings shall be acted upon and enforced in such and the same manner as writs and proceedings of the said Courts are now acted upon and enforced, or as near thereto as the circumstances of the case will admit; and any existing

Alteration of Forms.

New forms of writs and other proceedings.

writ or proceeding the form of which shall be in any manner altered in pursuance of this Act shall nevertheless be of the same force and virtue as if no alteration had been made therein, except so far as the effect thereof may be varied by this Act.

Schedules.

Schedules to
form part
of Act.

241. The Schedules to this Act annexed shall be deemed to be a part of this Act, and the forms therein given may be used with such modification and departures as the particular facts of the case may render necessary, but no verbal or technical error or omission in the following of the same shall be fatal; and all departures, errors, or omissions, which have not a manifest tendency to mislead or prejudice the opposite party in the merits of his case, shall be deemed to be technical and immaterial.

Schedule of
Law Fund
duties.

242. The several duties set forth in the Schedule D. to this Act annexed shall be the respective Law Fund Duties on the proceedings in actions in the said Superior Courts of Law in *Ireland*, and shall be in lieu and stead of the existing duties in respect of the same subject matter; and the like penalties, forfeiture, and remedies for the enforcement and recovery of the same, shall attach upon the said duties as previously existed in respect of the Law Fund Duties heretofore in force.

Schedule of
fees and costs

243. The several fees mentioned and set forth in the Schedule E. to this Act annexed shall be the fees chargeable against any party, plaintiff or defendant, in respect of the specified items of proceedings to which the same shall be applicable until the same shall be altered or amended by any general rule of the Judges under the powers herein-before given; and the said Judges are hereby required, by a General Order, to settle a schedule of fees to be allowed in taxation of costs of proceedings under this Act, having regard to the said Schedule E. to this Act annexed: provided always, that in case the plaintiff in any action of contract (except for breach of promise of marriage) shall recover, exclusive of costs, less than twenty pounds, or in any action for any wrong or injury disconnected with contract (except replevin, or for slander, libel, malicious prosecution, seduction, or criminal conversation), a sum not exceeding five pounds, the plaintiff in any such action shall be entitled to no more than one half of the ordinary costs, unless the action has been brought for the purpose of trying a right to property more extensive than the sum sued for (*r*).

3 & 4 Vict. c.
24, s. 2.

(r) By the 103rd G. O., 1854, it is provided that the Judge shall, upon the application of the plaintiff, determine whether the plaintiff is entitled to full costs; such application to be made at the conclusion of the trial or during the sittings or assizes; and the order of the Judge shall be endorsed on the record.

Certificate of Judge.

As to when and how the Judge's certificate is to be given; and as to what is a wrong or injury disconnected with contract, see the note to section 97 of the C. L. P. Act, 1856; where see, also, as to the construction of the word "recover" and as to the consequences of including several causes of action in the summons and plaint.

In *Armstrong v. Dwyer*, 1 Ir. Jur. N. S. 296, the action was brought for an injury done to the plaintiff's mill by the diversion of a watercourse in which the defendant allowed judgment to go by default, and the damages were assessed at 40s., and it was held that as the right to property had not been raised by the pleadings the plaintiff was not entitled to full costs. If, however, the action was really brought to try a right, the Judge is not deprived of the power of certifying merely because the defendant has not chosen to contest it by his defence (*Shuttleworth v. Cocker*, 1 M. & G. 829, per Maule, J.; *Morrison v. Salmon*, 2 M. & G. 390). In the former case the action was for a nuisance in carrying on an offensive trade in which the plea was not guilty, and it was held that the Judge had power, if he thought fit to exercise it, to certify that the action was brought to try a right besides the mere right to recover damages.

Right to property more extensive than the sum sued for.

Where no trial takes place, but the damages are assessed either by writ of inquiry or otherwise, it is the duty of the Taxing Master in the first instance to decide whether there was a right in issue more extensive than the sum sued for (*Bennett v. Scott*, 8 Ir. Jur. N. S. 206); in which case the action was for widening and deepening the bed of a stream, which the defendant justified on the grounds that he did the acts complained of for the purpose of removing a wrongful obstruction.

Where no trial.

It should be remembered that although the Judge gives a certificate under section 126, *ante*, and under section 97 of the C. L. P. Act, 1856, the plaintiff will nevertheless be entitled to half costs only in cases within the present section, unless the action has been brought for the purpose of trying a right to property more extensive than the sum sued for (*Manning v. Chadwick*, 9 Ir. C. L. R. Ap. 32; *Toone v. Garvey*, 2 Ir. Jur. N. S. 49).

Certificate under other sections.

SCHEDULE A.

ACTS TO BE REPEALED;

IN SO FAR AS IN THE FOREGOING ACT DECLARED.

Date of Act.	Title of Act.	Extent of Repeal*
38 Hen. 6, c. 1.	An Act that none shall sue actions in the Exchequer unless the plaintiff be Minister to the Exchequer, or servant to any Minister of Record of the Exchequer, upon pain of £10.	The entire Act.
3 Edw. 4, c. 2.	An Act what fees attorneys in the King's Court shall take, and what fees shall be paid for writs and other records.	The entire Act.
7 Edw. 4, c. 4.	An Act for removing of the Exchequer and Common Pleas.	The entire Act.
28 Hen. 8, c. 21.	The Act of penal statutes.	The entire Act.
33 Hen. 8, sess. 2, c. 3.	An Act touching misleading and jeofails.	The entire Act.
11 Eliz. sess. 3, c. 2.	An Act for the making of the Trinity Term shorter, and for the commencement thereof.	The entire Act.
10 Car. 1, sess. 2, c. 6.	An Act for limitation of actions, and for avoiding of suits in law.	Sections 14, 15, and 17.
10 Car. 1, sess. 2, c. 11.	An Act for expedition of justice in cases of demurrers, &c.	The entire Act.
10 Car. 1, sess. 2, c. 12.	An Act for reformation of jeofails, &c.	The entire Act.
10 Car. 1, sess. 2, c. 15.	An Act that like process shall be had in writ of annuity, and certain other actions, as in an action of debt.	The entire Act.
10 Car. 1, sess. 2, c. 16.	An Act for ease in pleading against troublesome and contentious suits prosecuted against Sheriffs, Justices of the Peace, Mayors, Constables, and certain other Officers, for the lawful execution of their office.	The entire Act.
15 Car. 1, c. 5.	An Act against discontinuance of writs of error in the Court of Exchequer, and for the better expedition in giving judgment therein.	The entire Act.
17 & 18 Car. 2, c. 12.	An Act to prevent arrests of judgment and superseding executions.	The entire Act.

* See ante, p. 2.

Date of Act.	Title of Act.	Extent of Repeal.
7 W. 3. c. 7.	An Act for reviving Two Statutes lately expired, and making them perpetual, and for avoiding unnecessary Suits and Delays.	The entire Act.
7 W. 3. c. 25.	An Act for the Prevention of Vexations and Oppressions by Arrests, and of Delays in Suits of Law.	Sections 7, 8, 9, 10 and 11.
9 W. 3. c. 10.	An Act for preventing frivolous and vexatious Law Suits, and giving Remedy to the Parties grieved to recover their Costs at Law in certain Cases where heretofore no Costs were given.	Sections 6, 7, 8, and 9.
6 Anne, c. 7.	An Act for lessening Sheriffs' Fees on Execution.	Sections 1 and 2.
6 Anne, c. 10.	An Act for the Amendment of the Law, and the better Advancement of Justice.	Sections 1, 2, 3, 4, 17, and 23.
8 Anne, c. 9.	An Act for delivering Declarations to Prisoners.	The entire Act.
2 G. 1. c. 11.	An Act for reviving and amending an Act intituled, "An Act for Recovery of Small Debts in a Summary Way before the Judges of Assizes."	Sections 14 and 15.
6 G. 1. c. 6.	An Act to prevent Delays in Writs of Error, and for the further amendment of the Law.	Sections 1, 2, 3, 4, and 18.
8 G. 1. c. 4.	An Act for the more effectual quieting and securing Possessions, and preventing vexatious Suits at Law.	Sections 1 and 2.
3 G. 2. c. 4.	An Act for the further explaining and amending the several Laws for preventing Frauds committed by Tenants, and for the more easy Renewal of Leases; and for the further Amendment of the Law in certain Cases therein mentioned.	Sections 7 and 8.
25 G. 2. c. 8.	An Act for the better adjusting and more easy Recovery of the Wages of certain Servants, and for the better Regulation of such Servants, and of certain Apprentices; and for the Punishment of all such Owners of Coal and their Agents as shall knowingly employ and set at Work Persons retained in the Service of other Coal owners; and also that mutual Debts between Party and Party be set one against the other.	Section 8.

Date of Act.	Title of Act.	Extent of Repeal.
21 & 22 G. 3. c. 18.	An Act for enlarging the Time for Trials by Nisi Prius in the City of Dublin and County of Dublin, and for making the Process of the Court of Exchequer more effectual against Persons who being served therewith refuse to appear.	The entire Act.
28 G. 3. c. 31.	An Act for the Amendment of the Law in certain Particulars therein mentioned.	Section 2.
43 G. 3. c. 53.	An Act to render the Process of His Majesty's Courts of King's Bench, Common Pleas, and Exchequer, in personal Actions in Ireland more beneficial, and also to prevent frivolous and vexatious Arrests, and to repeal so much of an Act passed in the Parliament of Ireland in the Twenty-first and Twenty-second Years of the Reign of His present Majesty, intituled "An Act for enlarging the Time of Trials by Nisi Prius in the City and County of Dublin, and for making the Process of the Court of Exchequer more effectual as relates to compelling the Appearance of Defendants in Personal Actions."	Sections 1, 2, 6, 7, and 8.
1 G. 4. c. 68.	An Act for the better Administration of Justice in the Court of Exchequer Chamber in Ireland.	Section 8.
9 G. 4. c. 14.	An Act for rendering a written Memorandum necessary to the Validity of certain Promises and Engagements.	Sections 1, 2, 3, & 4.
9 G. 4. c. 15.	An Act to prevent a Failure of Justice by reason of Variances between Records and Writings produced in Evidence in support thereof.	The entire Act.
1 & 2 W. 4. c. 31.	An Act to improve the Administration of Justice in Ireland.	Sections 2, 5, 14, 15, 16 and 17.
3 & 4 W. 4. c. 91.	An Act for consolidating and amending the Laws relative to Jurors and Juries in Ireland.	Sections 10 and 12.
3 & 4 Vict. c. 105.	An Act for abolishing Arrest on Mesne Process in Civil Actions, except in certain cases, and for extending the Remedies of Creditors against the Property of Debtors, and for the further Amendment of the Law, and the better Advancement of Justice in Ireland.	Sections 7, 20, 23, 24, 32, 33, 34, 35, 36, 37, 38, 39, 44, 46, 47, 48, 49, 50, 51, 52, except so far as relates to the Jurisdiction of a Court of Equity.

Date of Act.	Title of Act.	Extent of Repeal.
12 Vict. c. 16. .	An Act to protect Justices of the Peace in Ireland from vexatious Actions for Acts done by them in the Prosecution of their Office.	Section 10.
13 Vict. c. 18. .	An Act for the Regulation of Process and Practice in the Superior Courts of Common Law in Ireland.	Sections 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 31, 38, 39.
14 & 15 Vict. c. 57. .	An Act to consolidate and amend the Laws relating to Civil Bills, and the Courts of Quarter Sessions in Ireland, and to transfer to the Assistant Barrister certain Jurisdiction as to Insolvent Debtors.	Section 40.

SCHEDULE B.

FORMS OF PROCEEDINGS.

No. 1.—*Summons and Plaint in Personal Actions.*

Court of Queen's Bench.

Victoria, &c. &c. to the said Richard Roe, greeting.

John James, of Westmoreland Street, in the City of Dublin, Grocer, <i>Plaintiff.</i> Richard Roe, of Mallow, in the County of Cork, Esquire, Executor of Henry Roe, <i>Defendant.</i> County of the City of Dublin.	}	Richard Roe, the defendant, is summoned to answer the complaint of John James, who complains, that the defendant is executor of Henry Roe, deceased, of Mallow, in the said County of Cork, and that, as such executor, he is indebted to the plaintiff in the sum of £140 on account of goods sold and delivered by the plaintiff to the said Henry Roe of the value of £140, the particulars of which are endorsed hereon [or annexed hereto].
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And the plaintiff prays judgment against the said defendant to re-

cover the said sum of £140 [and interest thereon], and his costs of suit.

Therefore the defendant is hereby required to appear in the said Court, within twelve days after the service hereof, and answer the said complaint, or in default thereof judgment shall be given according to law.

Witness the Lord Chief Justice and other Justices of Her Majesty's Court of Queen's Bench at Dublin.

Dated Monday the 20th day of January, 1854.

WILLIAM THOMPSON, attorney for the plaintiff,
No. 12, Clare Street, Dublin.

Endorsement of Particulars.

Jan. 1, 1850.—By amount of goods furnished as per account furnished 1st December, 1853 . . .	£200 0 0
Dec. 10, 1853.—By cash received on account . . .	60 0 0

Balance due plaintiff	<u>£140 0 0</u>
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No. 2.—Appearance and Defence.

Court of Queen's Bench,
Saturday, the 30th day of January, 1854.

John James,

Plaintiff.

Richard Roe, Executor of

Henry Roe,

Defendant.

The said Richard Roe appears and takes defence to the action of the said John James, and says that the goods sold and delivered to Henry Roe, were of the value of £80, and no more; and that the said sum of £80 has been paid by the defendant to the plaintiff, and is sufficient to satisfy the plaintiff's demand, and therefore he defends the action.

EDWARD MOLONEY, Attorney for the defendant,
No. 14, Capel Street, Dublin.

Endorsement of Particulars of Payment.

Aug. 1, 1851.—By cash paid Plaintiff by defendant . . .	£45
„ By defendant's acceptance, dated at three months	35
	<u>£80</u>

No. 3.—*Demurrer to a Plaintiff or Defence.*

Court of Queen's Bench,
Saturday, the 26th day of February 1854.

John James, <i>Plaintiff.</i> Richard Roe, Executor of Henry Roe, <i>Defendant.</i>	}	The said Richard Roe, the defendant, appears and says, that the summons and plaintiff does not disclose any cause of action good in substance, because that no sufficient consideration for the alleged promise of the defendant as executor of the said Henry Roe is stated therein, to render the said defendant liable to pay the debt of the said Henry Roe.
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EDWARD MOLONEY, attorney for the defendant.
No. 14, Capel Street, Dublin.

No. 4.—*Judgment by Default for Want of Defence.*

Court of Queen's Bench, on Monday, the 20th day of June,
A. D. 1854 (*Day of signing Judgment*).

County of the City of } Dublin.	}	John James, by William Thompson, his attorney, sued out a writ of summons and plaintiff against Richard Roe, claiming the sum of £140 for debt on account of a Bill of Exchange drawn by Henry Jasper, dated the 15th day of October 1853, and endorsed by the said Richard Roe.
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And the said Richard Roe has not appeared to take defence; but the service of such writ and the contents of said plaintiff have been duly verified.

Therefore, it is considered, that the said John James do recover against the said Richard Roe the sum of £140, together with for costs.

No. 5.—*Abstract for Nisi Prius.*

Court of Queen's Bench,
Monday, the 20th Day of March, A. D. 1854.

County of Sligo, to wit. John James, <i>Plaintiff.</i> Richard Roe, <i>Defendant.</i>	}	Whereas John James, the plaintiff, has sued Richard Roe, the defendant, and demanded the sum of £150 as the price and value of 130 barrels of wheat sold and delivered to the defendant. And the said Richard Roe has taken defence, and admits the delivery of the
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wheat, but has alleged that he paid the sum of £130 to the plaintiff before the commencement of this action, and that such payment was a full satisfaction of the value of said wheat, and that said wheat was not sound and merchantable at the time of its delivery to the Plaintiff.

Therefore let the Jury try—

- 1st. Whether the said wheat was sound and merchantable at the time of its delivery.
- 2d. Whether the value of said wheat exceeded the sum of £130.

ROBERT JONES, attorney for the plaintiff.

HENRY GREENE, attorney for the defendant.

No. 6.—*Bill of Exceptions.*

Court of Queen's Bench,
Monday, 20th Day of July, 1854.

John James,
Plaintiff.

Richard Roe,
Defendant.

} The issues in fact in the annexed abstract of Nisi Prius having come to be tried by a jury on this day, the plaintiff produced and examined as a witness one *G. H.* to prove the fact of [*q.c. &c.*]; and the said *G. H.* deposed that [*q.c. &c.*], which evidence the defendant objected to as not being legal evidence of the fact; and the plaintiff insisting to the contrary, the Judge at Nisi Prius admitted the evidence to be received accordingly, and therefore the defendant excepts, and prays that his exception shall be placed upon the record for the examination of the Court above.

(Signed) *L. M.*, Counsel for defendant.
L. P., Judge.

No. 7.—*Order of Attachment of Stock.*

Court of Queen's Bench,
Monday, 20th day of June, 1854.

John James,
Plaintiff.

Richard Roe,
Defendant.

} By the Right Honourable Mr. Justice Moore.
It appearing to the Court that the plaintiff hath recovered judgment against the defendant in the sum of £300, and that such judgment is still un-

satisfied; and it also appearing that the defendant is possessed of a sum of £200 Government $3\frac{1}{2}$ per Cent. Stock, standing in his own name in the books of the Governor and Company of the Bank of Ireland;

The said sum of £200, and all dividends thereon, are hereby attached to answer the said debt until further order; and the said Governor and Company of the Bank of Ireland are hereby ordered and required not to suffer the same, or any part thereof, to be transferred, paid, or dealt with until further order.

RICHARD MOORE, Justice.

CHRISTOPHER DUFF, Clerk of the Rules.

No. 8.—*Satisfaction Piece, Affidavit, and Requisition to enter Satisfaction on Judgment,*

See H. 27, v. 1, 116

A.B.	}	I A.B. of	did obtain a
Plaintiff.		judgment in the Court of	as of
C.D.		Term 18 Roll No.	against
Defendant.		C.D.	for the sum of

which said judgment has been fully satisfied and discharged; and I hereby consent that satisfaction be entered on the record of said judgment.

Dated this day of 18 .

Signed in presence of *E.F.*

A.B.

The above-named *E.F.* of this day maketh oath and saith, that he is the subscribing witness to, and saw the above consent duly executed by *A.B.* of and saith, that the name *E.F.* subscribed as witness to the above consent is deponent's proper name and handwriting. (Signed) *E.F.*

Sworn before me, this

Now, I *G.H.* of a practising attorney of this honourable court, do hereby on behalf of the defendant require the proper officer to enter satisfaction on the Record of said judgment.

(Signed) *G.H.*, attorney.

To the Master of the Court of

No. 9.—*Suggestion of Breaches.*

Queen's Bench,
Monday, the 20th day of June, 1854.

John James,
Plaintiff.
Richard Roe,
Defendant.

And now, on this day the said John James, the plaintiff, comes and informs the Court that after the recovery of the said judgment, and on the 1st day of April, 1853, another half-yearly gale of the said annuity, amounting to the sum of £100, became due and payable to the plaintiff, and that the defendant has neglected and refused to pay the same, in breach and violation of the conditions of the said bond upon which the plaintiff recovered such judgment, and therefore the plaintiff prays execution of the said judgment for the further sum of £100.

No. 10.—*Suggestion for Execution against the Judgment Debtor.*

John James,
Plaintiff.
Richard Roe,
Defendant.

And now, on the 26th day of June, 1854, it is suggested, and manifestly appears to the Court, that the said *A.B.* [or *C.D.*, as such executor of the last will and testament of the said *A.B.* deceased, or as the case may be], is entitled to have execution of the judgment aforesaid against the said *E.F.* [or against *G.H.*, as executor of the last will and testament of the said *E.F.*, as the case may be]: therefore it is considered by the Court that the said *A.B.* [or *C.D.*, as such executor as aforesaid, or as the case may be], ought to have execution of the said judgment against the said *E.F.* [or against *G.H.*, as such executor as aforesaid, or as the case may be.]

No. 11.—*Form of Writ of Revivor.*

In the Queen's Bench.

Victoria, &c., &c., to the said Richard Roe, greeting.

County of Clare.

John James,
Plaintiff.
Richard Roe,
Defendant.

Richard Roe, the defendant, is summoned to appear and show cause wherefore Edward Jones, executor of the said John James, shall not * have execution against the said Richard Roe, of a judgment whereby John James, on the 1st day of June, 1850, in the said Court of Queen's Bench, recovered against the

said Richard Roe the sum of £300, and of which sum the said Edward Jones alleges that there remains due and unsatisfied the sum of £100.

Therefore the said Richard Roe is hereby required to appear in the said Court within eight days after the service hereof, and show cause wherefore execution should not be had accordingly; or in default thereof the said Edward Jones may proceed to execution for said sum of £100 and his costs.

Witness the Lord Chief Justice and other Justices of Her Majesty's Court of Queen's Bench at Dublin.

Dated Monday, the 26th day of April, 1854.

WILLIAM THOMPSON, attorney for the said Edward Jones,
No. 12, Clare-street, Dublin.

No. 11 A.—*Like in case of Interlocutory Judgment.*

[*Proceed as in last form to the asterisk (*) and then as follows:*—assess and recover [*or recover*] the damages in respect of a judgment whereby the said John James, on the 1st day of June, 1850, in the said Court of Queen's Bench, was adjudged in that behalf entitled, and which inquiry of damages as yet remains to be made [*if the case be so*].

Therefore the said Richard Roe is hereby required to appear in the said Court within eight days after the service hereof, and show cause wherefore the said assessment should not be made [*if not made*] and recovery had as aforesaid, or in default thereof the said Edward Jones may proceed to assess and recover [*or to recover*] such damages against the said C.D.

Witness, the Lord Chief Justice and other Justices of Her Majesty's Court of Queen's Bench at Dublin.

Dated Monday, the 4th day of April, 1854.

WM. THOMPSON, attorney for the said E.F.,
No. 12, Clare-street, Dublin.

No. 12.—*Memorandum of Error.*

In the Queen's Bench,
the 20th day of April, 1854.

[*The day of lodging Note of Error.*]

A.B. and C.D.

The plaintiff [*or defendant*] says that there is error in law in the record and proceedings in this action.

(Signed) A.B., plaintiff.
[*or C.D. defendant.*]
[*or E.F., attorney for plaintiff or defendant.*]

[In case the plaintiff has died after judgment and before error brought by his legal representative, say, *A.B.* and *C.D.*—*E.F.* says that the plaintiff *A.B.* is dead, and that the said *E.F.* is the executor of the last will and testament of *A.B.* [as the case may be], and further says that there is error, &c., &c., as above].

No. 13.—*Suggestion of Joinder in Error in Law.*

Monday, the 20th day of June, 1854.

[*The Day of making the Entry on the Roll.*]

The plaintiff [or defendant] says that there is error in the above record and proceedings, and the defendant [or plaintiff] says there is no error therein.

No. 14.—*Memorandum of Error in Fact.*

In the Queen's Bench,
the 26th day of May, 1854.

'[*The Day of lodging Note of Error.*]

A. B. and *C. D.* in error.

The plaintiff [or defendant] says that there is error in fact in the record and proceedings in this action, in the particulars specified in the affidavit hereunto annexed.

(Signed) *A. B.*, plaintiff.
[or *C. D.*, defendant.]
[or *E. F.*, attorney for the plaintiff or defendant.]

No. 15.—*Summons and Plaint in Ejectment.*

Court of Queen's Bench.

Victoria, &c., &c., to the said *G. H.* and *I. K.* and all persons concerned, greeting.

A. B., *C. D.*, and *E. F.*,
Plaintiffs.

G. H. and others,
Defendants.

County of Leitrim.

G. H. and *I. K.*, the defendants, have been summoned to answer the complaint of *A. B.*, *C. D.*, and *E. F.*, the plaintiffs, who complain that* the plaintiffs, or some or one of them, on the 1st day of July, 1853, became and were and are still enti-

tled to the quiet and peaceable possession of the lands of Blackacre in the County of Leitrim, and the defendant wrongfully assumed the possession thereof, and still withholds the same from the plaintiffs.

And therefore the plaintiffs pray judgment against the said defendants to recover the possession of said lands or premises; [*and in case of ejectment on the title where the plaintiffs seek to recover mesne rates, add and compensation in damages for the loss of the mesne rates and profits of the said premises while the possession thereof was withheld from the said plaintiffs, to the amount of £*] therefore [*&c., &c., as in Form 1.*]

In case of ejectment for nonpayment of rent copy last form to the asterisk (), and then say,* that the defendant holds the lands of Blackacre, in the County of Leitrim, as tenant to the plaintiffs under a lease, at the yearly rent of £50, and that the sum of £80, being for one year and upwards of such rent, due and ending on the 1st day of January, 1854, is due to the plaintiffs. And therefore [*&c., &c., as in last form.*].

Endorsement of Particulars of Rent due on Ejectment for Nonpayment of Rent.

1st Jan. 1853.—By balance year's rent, due on this day £30 0 0

1st Jan. 1854.—By one year's rent due . . . 50 0 0

£80 0 0

No. 16.—*Defence in Ejectment on the Title.*

Queen's Bench, Thursday, 20th day of April, 1854.

A. B., C. D., and E. F.

Plaintiffs.

G. H. and others,

Defendants.

} George Hines, one of the defendants, appears and takes defence for the said lands of Blackacre, and says that the said plaintiffs are not entitled to the possession of them, and that the said possession belongs to the said George Hines, as of right, and therefore he defends the action.

EDWARD MOLONEY, attorney for the said George Hines,
No. 14, Capel Street, Dublin.

No. 17.—*Defence in Ejectment for Nonpayment of Rent.*

A. B., C. D., and E. F., <i>Plaintiffs.</i> G. H. and others, <i>Defendants.</i>	}	George Hines, one of the defendants, and tenant to the lands of Blackacre, appears and takes defence and says, that the rent of the said premises is not in arrear, and that the defendant paid the said rent and every part thereof to the said plaintiffs before the commencement of this action, and there- fore he defends as aforesaid.
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EDWARD MOLONEY, attorney for the said George Hines,
14, Capel Street, Dublin.

Endorsement of Particulars of Payment.

1st June, 1854.—By cash paid by defendant, George Hines,
to plaintiff, ... £140

No. 18.—*Judgment by Default in Ejectment for all the Lands.*

In the Queen's Bench, the 26th day of June, 1854.

[*Date of Writ.*]

A. B., <i>Plaintiff.</i> C. D., <i>Defendant.</i> County of Leitrim, to wit.	}	On the day and year above written, a writ of summons and plaint issued forth returnable into this Court in these words; that is to say [<i>here copy the writ</i>]; and no appearance and defence has been en- tered to the said writ: Therefore it is considered that the said [<i>here insert the</i> <i>names of the plaintiffs in the writ</i>] do recover possession of the land in the said writ mentioned, with the appurtenances.
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No. 19.—*Judgment by Default in Ejectment for Part.*

In the Queen's Bench, on the 26th day of June,
A. D. 1854.

County of Leitrim, to wit.	}	On the day and year above written, a writ of summons and plaint issued forth returnable into this Court, in these words; that is to say, [<i>here copy</i> <i>the writ</i>]; and C. D. has, on the 1st day of May, appeared by Edward
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Moloney, his attorney [*or in person*], to the said writ, and has defended for a part of the land in the writ mentioned; that is to say [*here state the part*]; and no appearance or defence has been entered to the said writ, except as to the said part: Therefore it is considered that the said *A. B.* [*the plaintiff*] do recover possession of the land in the said writ mentioned; except the said part, with the appurtenances, and that he have execution thereof forthwith; and as to the rest, let a jury come, &c.

No. 20.—*Abstract for Nisi Prius.*

In the Queen's Bench,
Monday, the 26th day of June 1854.

County of Wicklow,
to wit.

John James,
Plaintiff.

Richard Roe,
Defendant.

} Whereas John James, the plaintiff, has sued Richard Roe, the defendant, for the recovery of the possession of the lands of Blackacre, claiming title thereto from the 20th day of January 1850; and the said Richard Roe has taken defence for the whole of the land mentioned in the summons and plaint: Therefore let the jury try whether the plaintiff was entitled to the possession of the said lands, or any part of them, on the said day, or at any time subsequent to such day, and before the commencement of the action, and whether the plaintiff is entitled to any and what damages for loss of mesne rates and profits.

No. 21.—*Judgment on Discontinuance in Ejectment.*

In the Queen's Bench, on the 26th day of June,
A. D. 1854.

[*Date of writ.*]

Leitrim,
to wit.

} On the day and year above written a writ of summons and plaint issued forth returnable into this Court in these words; that is to say [*here copy the writ*]; and *C. D.* has on the 18th day of July appeared by Henry Robinson, his attorney [*or in person*], to the said writ, and *A. B.* has discontinued the action: Therefore it is considered that the said *C. D.* be acquitted, and that he recover against the said *A. B.* £ for his cost of defence.

No. 22.—*Judgment on Confession in Ejectment.*

In the Queen's Bench, the 30th day
of June 1854.

[*Date of writ.*]

Leitrim, } On the day and year above written a
to wit. } writ of summons and plaint in ejectment
issued forth returnable into this Court in these words; that is to say,
[*here copy the writ*]; and *C.D.* has on the 1st day of January appeared by
Henry Roe, his attorney [*or in person*], to the said writ; and the said
C. D. has confessed the said action [*or has confessed the said action as to*
part of the said land, that is to say, *here state the part*]: Therefore it is
considered that the said *A. B.* do recover possession of the land in the
said writ mentioned [*or of the said part of the said land*], with the
appurtenances, and £ for costs.

No. 23.—*Writ of Replevin.*

Writ of Replevin. Victoria, by the Grace of God, of the United Kingdom of
Great Britain and Ireland, Queen, Defender of the Faith, and
so forth : To the Sheriff of , greeting : We com-
mand you, that without delay you cause to be replevied to
A.B. his goods and chattels (and cattle), to wit, which
C.D. took, and unjustly detains, as it is said, and after what
manner you shall have executed this our Writ make appear to
us [*or to our Justices or Barons, as the case may be*] at the
Queen's Courts, Dublin, and have there this our Writ.

Witness the seal of our Superior Courts of Common Law
hereunto set at Dublin the day of in the year
of our Lord 1851.

Issued by of No. , Dublin, attorney for said *A.B.*

SCHEDULE C.

FORMS OF PLEADINGS.

STATEMENTS OF CAUSES OF ACTION.

On Contracts.

1. Money payable by the defendant to the plaintiff for *[these words, money payable, &c., should precede statement of causes of action like 1 to 9, but need only be inserted in the first]* goods bargained and sold by the plaintiff to the defendant. Goods sold.
2. Work done and materials provided by the plaintiff for the defendant at his request. Work and materials.
3. Money lent by the plaintiff to the defendant. Money lent.
4. Money paid by the plaintiff for the defendant at his request. Money paid.
5. Money received by the defendant for the use of the plaintiff. Money received.
6. Money found to be due from the defendant to the plaintiff on accounts stated between them. Account stated.
7. A messuage and lands sold and conveyed by the plaintiff to the defendant. For an estate sold.
8. The defendant's use, by the plaintiff's permission, of messuages and lands of the plaintiff. For the use of a house and land.
9. The hire of *[as the case may be]*, by the plaintiff let to hire to the defendant. For the hire of goods, &c.
10. That the defendant on the day of A. D. Payee against
by his promissory note, now overdue, promised maker of
to pay to the plaintiff £ two months after date, but did note.
not pay the same.
11. That one A., on, &c. *[date]*, by his Promissory Note, Endorsee
now over-due, promised to pay to the defendant, or order, against en-
£ *[two]* months after date, and the defendant en- dorse of
dorsed the same to the plaintiff, and the said note was duly note.
presented for payment, and was dishonoured, whereof the
defendant had due notice, but did not pay the same.
12. That the plaintiff, on, &c. *[date]*, by his Bill of Drawer
Exchange, now over-due, directed to the defendant, required against ac-
the defendant to pay to the plaintiff £ two months ceptor of bill.
after date, and the defendant accepted the said bill, but did
not pay the same.

Payee
against
drawer.

13. That the defendant, on, &c. [date], by his Bill of Exchange directed to A., required A. to pay to the plaintiff £ [two] months after date, and the said bill was duly presented for acceptance, and was dishonoured, of which the defendant had due notice, but did not pay the same.

Breach of
promise of
marriage.

14. That the plaintiff and defendant agreed to marry one another, and a reasonable time for such marriage has elapsed, and the plaintiff has always been ready and willing to marry the defendant, yet the defendant has neglected and refused to marry the plaintiff.

Warranty of
a horse.

15. That the defendant, by warranting a horse to be then sound and quiet to ride, sold the said horse to the plaintiff, yet the said horse was not then sound and quiet to ride.

Upon a lease
for rent.

16. That the plaintiff let to the defendant a house, No. 54, Baggot-street, for seven years, to hold from the day of A. D. at £ a year, payable quarterly, of which rent quarters are due and unpaid.

Upon a cove-
nant to re-
pair.

17. That the plaintiff by deed let to the defendant a house, No. 40, Great Britain-street, to hold for seven years from the day of A. D. , and the defendant by the said deed covenanted with the plaintiff, well and substantially, to repair the said house during the said term [according to the covenant], yet the said house was during the said term out of good and substantial repair.

For Wrongs independent of Contract.

Trespass to
land.

18. That the defendant broke and entered certain land of the plaintiff, called the "Big Field," and depastured the same with cattle.

Assault, bat-
tery, and
false im-
prisonment.

19. That the defendant assaulted and beat the plaintiff, gave him into custody to a policeman, and caused him to be imprisoned in a police office.

Criminal con-
versation.

20. That the defendant debauched and carnally knew the plaintiff's wife.

Wrongful
conversion of
goods.

21. That the defendant converted to his own use the plaintiff's goods; that is to say, household furniture [or as the case may be].

Wrongful
detention of
property.

22. That the defendant detained from the plaintiff his title deeds of land called Belmont, in the county of , that is to say [describe the deeds].

23. That the plaintiff was possessed of a mill, and by reason thereof was entitled to the flow of a stream for working the same; and the defendant, by cutting the bank of the said stream, diverted the water thereof away from the said mill.

Diverting
water from a
mill.

24. That the plaintiff was the first and true inventor of a certain new manufacture, that is to say, of "certain improvements in the manufacture of sulphuric acid," and thereupon Her Majesty Queen Victoria, by Letters Patent under the Great Seal of England, granted the plaintiff the sole privilege to make, use, exercise, and vend the said invention within Ireland, for the term of fourteen years, from the day of A.D. , subject to a condition that

Infringement
of a patent.

the plaintiff should, within six calendar months next after the date of the said Letters Patent, cause to be enrolled in the High Court of Chancery an instrument in writing under his hand and seal, particularly describing and ascertaining the nature of his said invention, and in what manner the same was to be and might be performed, and the plaintiff did, within the time prescribed, fulfil the said condition, and the defendant during the said term did infringe the said patent right.

25. That the defendant falsely and maliciously spoke and published of the plaintiff the words following, that is to say, "he is a thief;"

Defamation
of character.

[If there be any special damage, here state it with such reasonable particularity as to give notice to the defendant of the peculiar injury complained of; for instance,]

Whereby the plaintiff lost his situation as gamekeeper in the employ of A.

26. That the defendant falsely and maliciously printed and published of the plaintiff, in a newspaper called " , " the words following; that is to say, "he is a regular prover under bankruptcies," the defendant meaning thereby that the plaintiff had proved, and was in the habit of proving, fictitious debts against the estates of bankrupts, with the knowledge that such debts were fictitious.

Pleas in actions on contracts.

27. That he never was lent the money as alleged.

Denial of
debt.

28. That he did not accept the bill as alleged.

29. That he never executed the alleged deed.

Denial of
deed.

30. That the alleged cause of action did not accrue within

Statute of
Limitations.

six years [*state the period of limitation applicable to the case*] before this suit.

Payment. 31. That before action he satisfied and discharged the plaintiff's claim by payment of the said sum of £50, in the time and manner herein endorsed.

Set-off. 32. That the plaintiff at the commencement of the suit was, and still is, indebted to the defendant in an amount equal to the plaintiff's claim, for [*here state the cause of set-off as in a summons and plaint, see forms, ante*], which amount the defendant is willing to set-off against the plaintiff's claim.

Release. 33. That after the alleged claim accrued, and before this suit, the plaintiff by deed released the defendant therefrom.

Pleas in actions for wrongs independent of contract.

- Not guilty. 34. That he did not assault the plaintiff as alleged.
 Leave and licence. 35. That he did what is complained of by the plaintiff's leave.
 Self-defence. 36. That the plaintiff first assaulted the defendant, who thereupon necessarily committed the alleged assault in his own defence.*

SCHEDULE D.

LAW FUND DUTIES ON PROCEEDINGS UNDER FOREGOING ACT.

	£	s.	d.
Affidavits	0	2	0
Attested copy of any pleading, judgment, affidavit, &c., &c., per folio of 72 words	0	0	4
Copy of any rule	0	2	0
Rule or order of every description	0	2	0
Summons and plaint, defences, demurrers, consents for judgment, and other pleadings	0	2	0
Writs of subpoena, execution, and all other writs whatsoever	0	2	0
Abstract for Nisi Prius	0	10	0
Report of Master	0	10	0

* See *Derrys v. Byrne*, 7 Ir. C. L. R. 302, referred to, *ante*, p. 52.

£ s. d.

Requisition to enter judgment, whether final or interlocutory, on cognovit or otherwise, except a final judgment where interlocutory judgment has been already entered,	.	0	10	0
Summons to tax costs	.	0	2	0
Requisition to tax costs not exceeding £20	.	0	2	0
Requisition to tax costs not exceeding £50	.	0	5	0
Requisition to tax costs not exceeding £100	.	0	10	0
Requisition to tax costs exceeding £100	.	1	0	0
General exemption from the foregoing duties in respect of all proceedings on behalf of paupers admitted to sue or defend <i>in forma pauperis</i> .				

SCHEDULE E.

TABLE OF COSTS OF PROCEEDINGS UNDER THE FOREGOING ACT.

No. 1.—*Costs of Writ issued and served where Debt is settled within six days after service.*

	£	s.	d.
Letter for payment (when sent)	0	3	4
Instructions to proceed	0	6	8
Summons and plaint, with particulars, not less than	0	12	6
Stamp duty and parchment	0	2	3
Copy for service	0	1	0
Service (if in Dublin)	0	5	0

1 10 9

In country cases, expense of service to be allowed according to the discretion of the taxing officer.

Costs of affidavit of service, and to verify, to be added, if debt is not settled within six days after service.

In cases in which it shall appear to the taxing officer to be proper that the plaint shall be settled by counsel, the same may be allowed for as follows:—

Instructions to counsel to settle, 1s. per folio, say six folios	0	6	0
Fee to counsel, not less than	0	10	6
Attendance on counsel	0	6	8

£2 13 11

No. 2.—*Defendant's Costs on Rule for Non-pros.*

	£	s.	d.
Instructions to defend	0	6	8
Term fee	0	6	8
Search for summons and plaint	0	3	4
Drawing and engrossing affidavit of service	0	4	0
Stamp duty	0	2	0
Rule to file same, entry of	0	3	4
Stamp duty on rule	0	2	0
Like on copy	0	2	0
Copy and service	0	2	0
Drawing and engrossing affidavit of service	0	4	0
Stamp duty	0	2	0
Signing	0	2	6
Fee on execution	0	12	6
Stamp duty	0	2	0
Parchment	0	0	3
Attendance with writ	0	3	4
	£2	18	7

No. 3.—*Costs of Judgment by Default.*

	£	s.	d.
Letter for payment	0	3	4
Instructions to proceed	0	6	8
Summons and plaint, fee on	0	12	6
Stamp duty and parchment	0	2	3
Copy for service	0	1	0
Service (if in Dublin)	0	5	0
Affidavit of service	0	4	0
Stamp duty	0	2	0
Swearing	0	1	6
Signing by attorney	0	2	6
Swearing affidavit to verify	0	0	6
Term fee	0	6	8
Search for defence	0	3	4
Fee on marking judgment	0	3	4
Engrossing certificate of parties	0	2	6
Signing and parchment	0	2	9

	£	s.	d.
Fee on execution	0	12	6
Stamp duty and parchment	0	2	3
Attendance with writ	0	3	4
Taxation of costs	0	5	0
Stamp duty on requisition	0	2	0
	£4	4	11

No. 4.—Costs of Trial at Nisi Prius and Judgment on Postea.

	£	s.	d.
Letter for payment	0	3	4
Instructions to proceed	0	6	8
Writ of summons and plaint	0	12	6
Stamp duty and parchment	0	2	3
Copy for service	0	1	0
Service (if in Dublin)	0	5	0
Instructions to counsel to settle plaint, 1s. per folio, say 10 folios	0	10	0
Fee to counsel	0	10	6
Attendance on counsel	0	6	8
Term fee	0	6	8
Copy defence for counsel	0	1	0
Draft case to advise proofs			
Fee to counsel	2	2	0
Attending him	0	6	8
Notice of trial, copy, and service	0	6	0
Attending sheriff for panel	0	3	4
Paid for panel	0	1	0
Draft abstract of record	0	5	0
Copy for service	0	1	0
Notice therewith, copy, and service	0	6	0
Engrossing abstract and parchment	0	3	6
Stamp duty	0	10	0
Attending registrar with abstract	0	3	4
Draft brief of trial, at 3s. 4d. per sheet			
Two copies thereof for counsel			
Two copies of notice of trial to annex	0	2	0
Paid fee to senior counsel			
Like to junior counsel			

	£	s.	d.
Attending counsel with briefs	0	6	8
Fee on subpoena ad testificandum	0	4	0
Stamp duty and parchment	0	2	3
Four copies for service	0	4	0
Paid services and viaticum			
Attendance on record (if in Dublin)	2	2	0
Term fee	0	6	8
Fee on marking judgment	0	3	4
Stamp duty	0	10	0
Certificate of parties names	0	2	6
Signing and parchment	0	2	9
Fee on execution	0	12	6
Stamp duty and parchment	0	2	3
Attendance with writ	0	3	4
Drawing bills of costs, at 1s. per page			
Two copies at 6d. per			
Service of costs	0	1	0
Requisition to tax (under £50).	0	5	0
Attendance to lodge	0	3	4
Attending to tax	0	6	8
Summons, &c.	0	3	4
Stamp duty	0	2	0
Certificate	0	0	1
	£		

N.B.—The taxing officer shall be at liberty to allow for a third counsel in special cases where the number of witnesses, or other special circumstances render it advisable; also to allow a fee for settling a defence demurrer, and other pleadings, and abstract of issues for Nisi Prius, when necessary.

THE
COMMON LAW PROCEDURE AMENDMENT ACT
(IRELAND), 1856.

19 & 20 VICT. CAP. 102.

An Act to further amend the Procedure in and to enlarge the Jurisdiction of the Superior Courts of Common Law in Ireland.
[29th July, 1856.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same as follows:—

1. This Act may be cited for all purposes as the “Common Law Procedure Amendment Act (*Ireland*), 1856.” Short title.

2. This Act and “The Common Law Procedure Amendment Act (*Ireland*), 1853,” shall be incorporated and construed together as one Act. 16 & 17 Vict. c. 113, incorporated.

3. The Act of the eighteenth and nineteenth *Victoria*, chapter seven, and so much of section one hundred and three of “The Common Law Procedure Act, 1854,” as provides that the enactments in the said section enumerated shall apply and extend to every Court of civil judicature in *Ireland*, are hereby repealed; provided that such repeal shall not affect anything duly done or any liability accruing before the commencement of this Act, or any penalty, forfeiture, or 18 & 19 Vict. c. 7, and so much of section 103 of 17 & 18 Vict. c. 125, as relates to Ireland, repealed.

other punishment incurred or to be incurred in respect of any offence committed before the commencement of this Act, or anything required to be done or which may hereafter become necessary to be done to support or continue any proceeding taken before the commencement of this Act.

Court or Judge may, by consent of parties, try questions of fact. 17 & 18 Vict. c. 125, s. 1.

4. The parties to any cause may, by consent in writing, signed by them or their attorneys, as the case may be, leave the decision of any issue of fact to the Court, provided that the Court, or a Judge, shall, in their or his discretion, think fit to allow such trial, or provided the Judges of the Superior Courts of Law at *Dublin* shall, in pursuance of the power in "The Common Law Procedure Amendment Act (*Ireland*), 1853," contained, make any general rule or order dispensing with such allowance, either in all cases or any particular class or classes of cases to be defined in such rule or order; and such issue of fact may thereupon be tried and determined, and damages assessed where necessary, in open Court, either in term or vacation, by any Judge who might otherwise have presided at the trial thereof by jury, either with or without the assistance of any other Judge or Judges of the same Court, or included in the same commission at the Assizes; and the verdict of such Judge or Judges shall be of the same effect as the verdict of a jury, save that it shall not be questioned upon the ground of being against the weight of evidence; and the proceedings upon and after such trial, as to the power of the Court or Judge, the evidence, and otherwise, shall be the same as in the case of trial by jury (a).

Trial by a Judge.

(a) The power given by this section to the parties to leave the decision of an issue of fact to the Judge in place of to a jury, has been rarely acted upon. Where a cause was tried at the assizes before a Judge without a jury, but there was no consent in writing and no rule drawn up, the Court refused to set aside the verdict (*Andrews v. Elliott*, 5 El. & Bl. 502). In the same case it was held, that a Commissioner of assize is a Judge within the meaning of the section.

Two Judges may sit at the same time for trial of causes pending in the same Court. 17 &

5. It shall be lawful for any one of the Judges of any of the superior Courts at *Dublin*, at the request of the Lord Chief Justice, the Chief Justice of the Common Pleas, or Lord Chief Baron, to try the causes entered for trial at Nisi Prius in *Dublin* in any of the Courts, on the same days on which

the said Lord Chief Justice, the Chief Justice of the Common Pleas, or Lord Chief Baron, or any other Judge of the same Court, shall be sitting to try causes in *Dublin*, so that the trial of two causes may be proceeded with at the same time; and all jurors, witnesses, and other persons who may have been summoned or required to attend at or for the trial of any cause before the said Lord Chief Justice, the Chief Justice of the Common Pleas, or Lord Chief Baron, as the case may be, shall give their attendance at and for the trial thereof before such other Judge as may be sitting to try the same by virtue of this Act; and it shall be lawful for the registrars and other officers of the Lord Chief Justice, the Chief Justice of the Common Pleas, or Lord Chief Baron, as the case may be, to appoint from time to time fit and proper persons, to be approved by the said Lord Chief Justice, the Chief Justice of the Common Pleas, or Lord Chief Baron, to attend for them and on their behalf respectively before such Judge; and the trial of every cause which shall be so had by virtue of this Act shall, if necessary, be entered of record, as having been had before the Judge by whom such cause in fact was tried.

18 Vict. c.
126, s. 2.

Power to
registrars to
appoint fit
persons to
attend the
second
Judge.

VI. If it be made appear, at any time after the issuing of the writ, to the satisfaction of the Court or a Judge, upon the application of either party, that the matter in dispute consists wholly or in part of matters of mere account which cannot conveniently be tried in the ordinary way, it shall be lawful for such Court or Judge, upon such application, if they or he think fit, to decide such matter in a summary manner, or to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to the Master of the Court, or, in country causes, to the Assistant-Barrister of any county or riding, upon such terms, as to costs and otherwise, as such Court or Judge shall think reasonable; and the decision or order of such Court or Judge, or the award or certificate of such referee, shall be enforceable by the same process as the finding of a jury upon the matter referred (b).

Power to
Court or
Judge, upon
application,
to direct
arbitration
before trial.
17 & 18 Vict.
c. 125, s. 3.

(b) This and the following sections relate to arbitrations. As to the nature of arbitrations in general and the changes introduced by the present Act, see sect. 14, *post*, note (h).

The present section has introduced a very considerable change in the law of arbitration. Formerly it was necessary in every case of arbitration that the submission should be by consent, and in no case could there be a compulsory reference. However, now the Court or Judge may direct a compulsory

Compulsory
references.

When reference may be made.

Matter of account.

reference in all cases falling within the present section. The power cannot, strictly speaking, be exercised at Nisi Prius (*Robson v. Lees*, 6 H. & N. 258; *Jefferyes v. Lovell*, 19 W. R. 408); but in practice cases are referred at the trial, inasmuch as the Judge may adjourn the trial and make an order *in camerâ* referring the cause (*Murray v. Sunderland Dock Co.*, 1 F. & F. 179; *Jones v. Beaumont*, *ib.* 336); see however, *Jefferyes v. Lovell*, *ubi supra*.

The statute, as will be observed, authorizes a compulsory reference whenever the matter in dispute consists wholly or in part of matter of mere account. The mere fact that some one item in the account between the parties may involve a charge of fraud does not oust the jurisdiction (*Imhoff v. Sutton*, L. R. 2 C. P. 406); and where in an action on an attorney's bill there was a dispute as to items, and also a defence on the ground of negligence, the Court refused to disturb an order made by a Judge referring the cause (*Reece v. Chaffers*, 11 W. R. 307). Where there was a set off to an attorney's bill and the question of retainer might arise on many of the items, it was held that the cause involved matter of account which could not be conveniently tried, and therefore that it should be referred (*Goodred v. Seale*, 2 F. & F. 382, and see *Blakeney v. Palmer*, 11 Ir. Jur. N. S. 135). So also an action for dilapidations may be referred (*Angell v. Felgate*, 7 H. & N. 396; *Cummings v. Birkett*, 3 H. & N. 156); and see further, *Trickett v. Green*, 1 H. & R. 63; *Browne v. Emerson*, 17 C. B. 361; *Credin v. Credin*, 3 Ir. Jur. N. S. 252; *Clark v. Ware*, 17 L. T. N. S. 144. On the other hand when the main question between the parties is one falling properly within the province of a jury, as for instance a question of liability or of fraud, it will be grounds for refusing a compulsory reference under this section; (*Brown v. Girard*, 19 L. T. N. S. 324; *Prior v. Perry*, 2 Ir. Jur. N. S. 422; *M'Donnell v. Jameson*, *ib.* 100; *Orphan School v. Henley*, 27 L. J. Ex. 426); and see *Pellatt v. Markwick*, 3 C. B. N. S. 760; *Rushforth v. Midland Great Western Railway Company*, 11 Ir. Jur. N. S. 245.

Proceedings before Master.

When a reference is made to the Master he must proceed with the inquiry, although a question of fraud should incidentally arise before him (*Insull v. Moojen*, 3 C. B. N. S. 359). In such cases the course to be adopted by the party is to apply to the Court to rescind the order of reference (*Clark v. Ware*, 17 L. T. N. S. 144). The Master, if required by either of the parties, must make up a report as prescribed by the 159th G. O., 1854 (*De Freyne v. French*, Ir. R. 1 C. L. 311).

Amending or setting aside award.

When an action is compulsorily referred it still remains in the Court in which it was brought. The Court may therefore, if necessary, amend the particulars of demand before the making of the award (*Gibbs v. Knightly*, 2 H. & N. 34). So also it may set aside the award made by the referee when the circumstances warrant such a course (*Watson v. Bennett*, 5 H. & N. 831). As to sending the cause back to be reconsidered by the referee see *Baggallay v. Borthwick*, 10 C. B. N. S. 61; *Wardell v. Hopkins*, 11 Ir. Jur. N. S. 212. As to appealing against a ruling of the Master see *De Freyne v. French*, *ubi supra*.

Costs.

An arbitrator upon a compulsory reference has no power over the costs either of the cause, reference, or award, unless the rule or order appointing him gives it to him, and where the rule is silent the successful party is not entitled to costs (*Bell v. Postlethwaite*, 5 El. & Bl. 695); and see further as to the question of costs on such a reference, p. 297, *post*; and as to amending an inadvertent omission to provide for costs in the order of reference see *Bell v. Postlethwaite*, *ubi supra*.

7. If it shall appear to the Court or a Judge that the allowance or disallowance of any particular item or items in such account depends upon a question of law fit to be decided by the Court, or upon a question of fact fit to be decided by a jury, or by a Judge, upon the consent of both parties, as hereinbefore provided, it shall be lawful for such Court or Judge to direct a case to be stated, or an issue or issues to be tried; and the decision of the Court upon such case, and the finding of the jury or Judge upon such issue or issues, shall be taken and acted upon by the arbitrator, master, or assistant-barrister, as the case may be, as conclusive.

Special cases may be stated, and question of fact tried. 17 & 18 Vict. c. 125, s. 4.

8. It shall be lawful for the arbitrator, master, or assistant-barrister, upon any compulsory reference under this Act, or upon any reference by consent of parties where the submission is or may be made a rule or order of any of the superior Courts of Law or Equity at *Dublin*, if he shall think fit, and if it is not provided to the contrary, to state his award, as to the whole or any part thereof, in the form of a special case for the opinion of the Court, and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the Court (c).

Arbitrator may state special case. 17 & 18 Vict. c. 125, s. 5.

S 20
p 21

(c) As to bringing error on a special case so stated, see sect. 38, *post*.

Error.

9. If upon the trial of any issue of fact by a Judge under this Act it shall appear to the Judge that the questions arising thereon involve matter of account which cannot conveniently be tried before him, it shall be lawful for him, on the application of either party, to order that such matter of account be referred to an arbitrator appointed by the parties, or to the master of the Court, or, in country causes, to the assistant-barrister of any county, or riding, upon such terms, as to costs and otherwise, as such Judge shall think reasonable; and the award or certificate of such referee shall have the same effect as hereinbefore provided as to the award or certificate of a referee before trial; and it shall be competent for the Judge to proceed to try and dispose of any other matters in question, not referred, in like manner as if no reference had been made (cc).

Power to Judge to direct arbitration at time of trial, when issues of fact left to his decision. 17 & 18 Vict. c. 125, s. 6.

(cc) The powers conferred by this section cannot be exercised by a Judge sitting at *Nisi Prius*, (*Jefferies v. Lovell*, 19 W. R. 408).

Where power exerciseable.

Proceedings before and power of such arbitrator. 17 & 18 Vict. c. 125, s. 7.

10. The proceedings upon any such arbitration or reference as aforesaid shall, except otherwise directed hereby or by the submission or document authorizing the reference, be conducted in like manner, and subject to the same rules and enactments, as to the power of the arbitrator, master of the Court, or assistant-barrister, and of the Court, the attendance of witnesses, the production of documents, enforcing or setting aside the award, and otherwise, as upon a reference made by consent under a rule of Court or Judge's order (d).

Witnesses.

(d) As to compelling the attendance of witnesses before arbitrators, and administering oaths, see 3 & 4 Vict. c. 105, ss. 63, 64; and 14 & 15 Vict. c. 99, s. 16, *post*, in the Appendix. See as to the construction of this section (*Re Rouse v. Mcier*, 19 W. R. 438).

Power to Judge to send back matters for re-consideration to arbitrator. 17 & 18 Vict. c. 125, s. 8.

11. In the case of any such arbitration or reference as aforesaid, the Court or a Judge shall have power at any time, and from time to time, to remit the matters referred, or any or either of them, to the re-consideration and re-determination of the said arbitrator or referee, upon such terms, as to costs and otherwise, as to the said Court or Judge may seem proper (e).

Sending back case to arbitrator.

(e) The power of the Court to remit a case to the arbitrator under this section is not confined to compulsory arbitration, but may be exercised in all cases where the submission may be made a rule of Court. See sect. 8, *ante*, and *Re Morris*, 6 E. & B. 383.

The powers conferred by this section have introduced a very considerable change in the law of arbitration. Formerly the rule was, that when once the arbitrator had made his award he was *functus officio*, and if the award so made was bad, the arbitrator had no power to amend the defect, and in consequence the proceedings became abortive. However, now under the above section, the Court has power at any time to remit the matters referred to the arbitrator, provided the submission may be made a rule of Court (as to which, see sect. 20, *post*), and by that means an award which is defective in consequence of some omission or oversight may be amended. The Court, however, is not authorized under this section to send back an award for re-consideration on any ground, except such as before the Statute would have warranted it in setting it aside, or treating it as a nullity (*Miller v. Bowyers*, 3 K. & J. 66).

Award must be certain and final.

In order that an award may be good, the arbitrator must pursue strictly the authority given to him. The award must therefore be certain and free from ambiguity, and it must also be conclusive, i. e. it must finally settle all the matters referred. Thus, an award directing that A. or B. shall do a particular act is bad for uncertainty (*Lawrence v. Hodgson*, 1 Y. & J. 16). Where an award directed that certain sums of money should be paid by one of the parties to the other, and that the former should secure the payment by his bond and warrant of attorney, and further that the warrant should be

lodged with the arbitrators, and that judgment should not be entered without their consent, it was held that the award was not final and was therefore bad (*Lindsay v. Lindsay*, 11 Ir. C. L. R. 311); and see further as to when an award is final *McCabe v. Grey*, 13 Ir. L. R. 343; *Greene v. Bracken*, 2 Ir. C. L. R. 176. An award is not bad for not deciding several items separately, unless either they were referred separately in form, or it clearly appears from the reference that the parties intended that they should be separately decided (*Whitworth v. Hulse*, L. R. 1 Ex. 251); and see *Richards v. Browne*, 9 Ir. C. L. R. 199. An award will not be bad for want of finality if it directs the payment of a sum of money which has not been ascertained, but the amount of which is ascertainable (*Gower v. Donovan*, 1 Jebb & Sym. 364; *Wilson v. Doolan*, 5 Ir. Jur. O. S. 135). The arbitrator should not take upon himself to include in the award a matter not agreed to be referred. If, however, he does, the award will not be bad, provided the portion of it, in respect of which the arbitrator has exceeded his authority, may be rejected as surplusage (*Wilson v. Doolan*, 5 Ir. Jur. O. S. 135). Where, however, it cannot be so rejected, as for instance where the rejection of it would alter the meaning of the remaining parts of the award, the award will be bad (*Hawkyard v. Stocks*, 2 D. & L. 937; *Lindsay v. Lindsay*, 11 Ir. C. L. R. 311).

Power to remit cannot be ousted by agreement.

Where arbitrator has decided wrongly.

In all such cases the Court has now got power under the present section to remit the matter to the arbitrator for amendment, and the jurisdiction of the Court may be exercised at any time, and cannot be ousted by inserting a prohibitory clause in the consent (*Coleman v. Cork and Youghal Railway Co.*, 13 Ir. C. L. R. 368). Where, therefore, the award is defective in consequence of some error involving no misconduct in the arbitrators or substantial injustice to the parties, it will as a general rule be sent back to the arbitrators (*Anning v. Hartley*, 27 L. J. Ex. 145; *Davies v. Pratt*, 17 C. B. 183). Where, however, the award is not void upon the face of it, it will not be sent back upon affidavits showing that the arbitrator has wrongly decided a point of law, or for an alleged mistake not manifest or apparent upon the face of it, or admitted by any affidavit or statement of the arbitrator (*Fuller v. Fenwick*, 3 C. B. 705; *Lockwood v. Smith*, 10 W. R. 268; *Cleary v. Cleary*, 10 Ir. C. L. R. 329; *Godfrey v. Broderick*, 14 Ir. C. L. R. Ap. 33; *Wardell v. Hopkins*, 11 Ir. Jur. N. S. 212). Where, however, it is admitted by the parties, or by the arbitrator, or is otherwise evident that the arbitrator has committed a mistake, the Court will remit the award (*Flynn v. Robertson*, L. R. 4 C. P. 324; *Mills v. Bowyers*, 3 K. & J. 66; *Burnard v. Wainwright*, 1 L. M. & P. 455; and see *Harland v. Corporation of Newcastle*, L. R. 5 Q. B. 47; *Re Dare Valley Railway Co.*, L. R. 6 Eq. 429). In all such cases it should be remembered that if the arbitrator has pursued his authority, and the award is regular upon the face of it, it may be enforced as it stands, but where it is defective upon the face of it, it is a nullity and cannot be enforced unless amended.

Applications to set aside the award. 17 & 18 Vict. c. 125, s. 9.

12. All applications to set aside any award made on a compulsory reference under this Act, shall and may be made within the first seven days of the term next following the publication of the award to the parties, whether made in vacation or term; and if no such application is made, or if no rule is granted thereon, or if any rule granted thereon is

afterwards discharged, such award shall be final between the parties (f).

Setting aside
award.

(f) The above section only provides for the setting aside of an award made under a compulsory reference. In other cases, the party desirous of setting aside an award must apply to the Court by notice, and the application must be made within the time mentioned on the next page.

The manner of proceeding when a party is desirous of showing cause against the confirmation of an award made under a submission to arbitration, which has been made a rule of Court, pursuant to 10 Wm. 3, c. 14, is prescribed by the 174th G. O., 1854, which see.

When the award is made under a submission not coming within the Statute referred to, the course to be adopted for the purpose of setting it aside is analogous to that prescribed in cases coming within it (*Smith v. Whitmore*, 1 H. & M. 576).

Until the submission to arbitration is made a rule of Court, the Court has no jurisdiction to disturb the award (*O'Keefe v. O'Connell*, 1 Fox & Sm. 66). As to setting aside an award in equity, see *Smith v. Whitmore*, *ubi supra*, and 2 De G. J. & S. 297.

For what set
aside.

Mistake.

The usual grounds upon which applications to set aside awards are made, are for mistake of law or fact, or for misconduct on the part of the arbitrator. Where it is sought to set aside awards upon the ground of mistake, the mistake should be apparent upon the face of the award, and the Court will not, as a general rule, enter into an examination of the merits of the case (*Sharman v. Bell*, 5 M. & S. 504). The rule is not, however, inflexible (*Hutchinson v. Shepperton*, 13 Q. B. 955); and if it plainly appears, either by admission or otherwise, that a mistake has been committed, pre-judging the parties' rights, the award will be set aside or sent back (*ib.*, *Flynn v. Robertson*, L. R. 4 C. P. 324; *Mills v. Bowyers*, 3 K. & J. 66).

Misconduct.

As regards the misconduct of the arbitrator, it is provided by section 2 of 10 Wm. 3, c. 4, that any arbitration or umpirage procured by corruption or undue means, shall be null and void. The misconduct for which an award will be set aside, need not be such in the bad sense of the word, and if gross carelessness was exhibited, it will be ground for setting aside the award (*Re Hall*, 3 Sc. N. R. 250). Proceeding in the absence of the party, or refusing to hear him, will also be ground for setting aside (*Dobson v. Groves*, 6 Q. B. 637; *Re Plews*, *ib.* 845; *Thornburn v. Barnes*, L. R. 2 C. P. 384); and see further, *Re Hopper*, L. R. 2 Q. B. 367; *Hutchinson v. Hayward*, 15 L. T. N. S. 291; and *Harbisen v. Forest*, 11 Ir. Jur. N. S. 442. In *Pilmore v. Hood*, 8 Scott, 180, the Court refused to set aside an award upon an allegation that the arbitrator had been imposed upon by the false swearing of a witness, and in *Solomon v. Solomon*, 28 L. J. Ex. 129, an application upon the grounds of the applicant having suffered a surprise was likewise refused.

In all such cases, it should be borne in mind that the misconduct of the arbitrator cannot be pleaded in bar to an action brought upon the award (*Thornburn v. Barnes*, L. R. 2 C. P. 384; *Braddick v. Thompson*, 8 East., 344; *Biddel v. Sutton*, 2 M. & P. 345). The only remedy of the party in such a case is to apply to the Court to set the award aside. If, however, the arbitrator has not pursued his authority, it would be different; and see, further, *Duke of Buccleugh v. Metropolitan Board of Works*, L. R. 3 Ex. 306.

As to the time within which such application must be made, it is provided by 10 Wm. 3, c. 14, s. 2, that an award procured by corruption or undue means may be set aside if complaint be made in the Court where the rule is made before the last day of the next term after such award published.

When application to be made.

This section applies only to awards coming within the Act of William. Where, however, the submission does not contain an agreement enabling the parties to make it a rule of Court, the Court will require the application to be made within the same time (*Smith v. Whitmore*, 1 H. & M. 576); and see, further, *North British Railway Co. v. Trowsdale*, 35 L. J. O. P. 262.

13. Any award made on a compulsory reference under this act may, by authority of a Judge, on such terms as to him may seem reasonable, be enforced at any time after seven days from the time of publication, notwithstanding that the time for moving to set it aside has not elapsed (g).

Enforcing of awards within period for setting them aside. 17 & 18 Vict. c. 125, s. 10.

(b) This section only provides for the enforcing of an award made upon a compulsory reference.

In the case of other awards the party may if he please proceed by action which was the only means by which the performance of an award could be enforced at Common Law. Where a reference is made by consent under the order of the Court or a Judge, an action will lie for non-performance of the award (*Livesley v. Gilmore*, L. R. 1 C. P. 570; *Wharton v. King*, 1 M. & Rob. 96). Where two persons assigned to B. all debts due to them, and gave him a power of attorney to receive and compound for the same; under which B. submitted to arbitration the matters in difference subsisting between his principals and the defendants; it was held that B. might maintain an action on the award in his own name (*Banfill v. Leigh*, 8 T. R. 571). Where the submission is by parol, and relates to an interest in land, no action can be brought upon the award (*Johnston v. M'Allister*, 1 Jones, 499). In a fit case the award may be enforced by suit in equity, notwithstanding that the submission has been made a rule of a Court of law (*Blackett v. Bates*, 2 H. & M. 610). As to enforcing the delivery of the possession of land when so awarded, see sect. 19, *post*.

Enforcing awards. By action.

The more usual way, however, of enforcing the performance of an award in cases where the submission has been or can be made a rule of Court is by the summary process of the Court; that is to say, by attachment when the award directs the doing of some specific act; and by execution under 3 & 4 Vict. c. 105, s. 27 (as to which see *ante*, p. 146), in cases where the award directs the payment of a sum of money. In cases where the submission has been made a rule of Court under 10 Wm. 3, c. 14, the mode of proceeding is prescribed by the 173rd G. O. of 1854, which see. In cases where the submission is not within that statute, the party must proceed by motion. If there is a fair doubt as to the validity of the award, the Court may, in place of enforcing it in a summary manner, put the party to his action (*Dickenson v. Allsop*, 13 M. & W. 722; *Macknade v. Sligo Railway Co.*, 9 C. B. 250).

By summary process.

Attachment. Execution.

14. Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them,

If action commenced by one part

after all have
agreed to
arbitration,
Court or
Judge may
stay pro-
ceedings. 17
& 18 Vict. c.
125, s. 11.

shall agree that any then existing or future differences between them or any of them shall be referred to arbitration (h), and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the Court in which the action or suit is brought, or a Judge thereof, on application by the defendant or defendants, or any of them, before appearance and defence or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit and still is ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms, as to costs and otherwise, as to such Court or Judge may seem fit: provided always, that any such rule or order may at any time afterwards be discharged or varied as justice may require (i).

Arbitration.

(h) As considerable changes in the law relating to arbitration have been introduced by the present statute, it may be desirable to state here shortly how the law upon the subject formerly stood, and in what respects it has been improved. For full information reference must of course be made to the treatises on the subject.

Effect o.
agreement
to refer.

At common law an agreement to refer a present or future difference to arbitration did not, as is well known, oust the jurisdiction of the Courts; and either party might, before the making of the award, revoke the submission to arbitration, and commence an action, to which the agreement to refer could not be pleaded in bar (*Harris v. Reynolds*, 7 Q. B. 71); and the rule as to the effect of such a plea is still the same (*Cooke v. Cooke*, L. R. 4 Eq. 77). In such cases the only remedy of the other party was by an action for damages for the breach of the agreement to refer. Although, however, the parties could not by their agreement oust the jurisdiction of the Courts, yet the original agreement between the parties might be such that no right of action would accrue until the making of an award by the arbitrator (*Scott v. Avery*, 5 H. L. Cas. 811). In other words, as succinctly laid down in *Elliott v. Royal Exchange Assurance Co.*, L. R. 2 Ex. 237, per Bramwell, B., if two persons, whether in the same or in a different deal from that which creates the liability, agree to refer the matter upon which the liability arises to arbitration, that agreement does not take away the right of action; but if the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something else is that some third person shall settle the amount, then no cause of action arises.

until the third person has so assessed the sum. On the other hand if the submission to arbitration is not revoked, and an award is duly made, the award may be enforced by action; and, furthermore, the award when made in conclusive between the parties. As laid down in Comyn's Dig. Tit. Accord, D. 1, in all actions where accord is a good bar, arbitrament is also a bar. Where the claim is for unliquidated damages an award which settles the amount may be pleaded in bar to the entire action, although the plea on the face of it shows the money is not paid. Where, however, the demand is in the nature of a debt, the award does not alter the nature of the original debt, and consequently a defence professing to answer the whole of the debt and not showing a discharge of the sum awarded will be bad (*Comings v. Heard*, L. R. 4, Q. B. 669, 672). In all such cases, it must, however, clearly appear that the jurisdiction of the arbitrator to make the award has attached within the contract of the parties (see *Sadler v. Smith*, L. R. 4, Q. B. 214, affirmed on appeal L. R. 5, Q. B. 40).

If the original cause of action was such that accord and satisfaction could not have been pleaded to it, as for instance in the case of a bond for payment of a money debt, the making of the award will not operate as an extinguishment of it, unless the agreement to refer was under seal; and an award cannot extinguish a judgment debt (*Barry v. Grogan*, Ir. 2 C. L. 390).

Such then being the effect of an agreement to refer, and of the making of an award at common law, it was found by experience to be extremely inconvenient, that after parties had agreed to refer their differences to arbitration, the submission could be revoked, and accordingly by 10 Wm. 3, c. 14, s. 1 (Ir.), it was provided, that parties might agree that their submission should be made a rule of Court, and thereupon the agreement might be entered of record in the Court agreed upon, and compliance with it enforced in the same manner as compliance with any other rule of Court (see the section of the Act, *post*, in the note to sect. 20).

10 Wm. 3, c. 14.

Making submission a rule of Court.

Notwithstanding, however, the provisions of this Act, it was held that until the submission was made a rule of Court it might be revoked (see *King v. Joseph*, 5 Taunt. 452; *Goulding v. Goulding*, 2 Ir. Law Rep. 164; but by 3 & 4 Vict. c. 105, s. 63, this defect was remedied, and it was provided that the submission in cases where it had been agreed that it might be made a rule of Court should not be revoked without the leave of the Court (see *post*, p. 297). As the law therefore stood after the passing of the statute last referred to, a submission to arbitration, provided it was agreed that it might be made a rule of Court, bound the parties and could not be revoked; but no provision was made for cases where the submission to arbitration contained no such agreement; and besides, there were several other defects in the law which rendered arbitration an unsatisfactory method of settling differences, and which accordingly it was considered desirable to amend when the present Act was introduced. The amendments so introduced may be shortly described as follows:—Any agreement to refer, if in writing, may be made a rule of Court (sect. 20), and if before it is so made, either party commences an action or suit, the Court may stay the proceedings (sect. 14). In cases of account the Court may without the consent of the party refer (sect. 6). When an arbitrator or umpire dies or refuses to act, or either partly, or the arbitrators refuse to appoint, provision is made by sects. 15 and 16 for the appointment of arbitrators or an umpire as the case may be; and by sect. 17, provision is made for the appointment of an umpire in cases where the parties have neglected to provide for it by their agreement. By

Revoking submission.

Changes introduced by the present statute.

sects. 11 and 18, the Court is empowered to send a case back to the arbitrator, and also to enlarge the time for the making of the award. By sect. 10, in all cases of arbitration (provided the submission can be made a rule of Court) the arbitrator shall have the same power as in the case of a reference under a rule of Court; and by sect. 8, he is empowered to state a special case. Finally sects. 12, 13 and 18, make provision for the setting aside and enforcing of awards. As to the manner of making a submission a rule of Court, see sect. 20, note (o), *post*; as to what is necessary, in order that an award may be binding and conclusive between the parties, see sect. 11, note (e); and as to amending an order of reference made by consent see *Vanderbyl v. M'Kenna*, L. R. 3 C. P. 252.

Staying proceedings.

What must appear.

(i) In order that the Court may have jurisdiction under this section to stay proceedings there must be a deed or instrument in writing between the parties to the action, or those through whom they claim. The application must also be made before appearance and defence, and it must appear that the defendant was at the time of the bringing of the action or suit, and still is ready and willing to concur in all the steps necessary towards arbitration. As to whether the actual agreement to refer need be contained in the instrument, in reference to which the differences have arisen, see *Mason v. Hadden*, 6 C. B. N. S. 526; *Blythe v. Lafone*, 1 E. & E. 435. When the agreement to refer is in writing, it may be made a rule of Court under sect. 20, *post*.

Agreement must embrace the difference.

Before making an order under this section, the Court must see that the agreement of the parties embraces the difference in reference to which the action is brought (*Smith v. Allen*, 3 F. & F. 156); and where an action was brought on a charter party, against a surety for freight, the Court refused a reference of a claim for compensation for a breach of warranty of the capacity of the vessel, that being a claim of which the charterer only could take advantage, and not the surety (*Daunt v. Lizard*, 27 L. J. Ex. 399); and see also, *Wood v. Robson*, 15 W. R. 756; *Wheatley v. Westminster Coal Co.*, 2 Drew & Sm. 347. As to whether the assignees of a bankrupt are persons claiming through him within the meaning of this section, see *Pennell v. Walker*, 18 C. B. 651; *Gaffney v. Killen*, 12 Ir. C. L. R. Ap. 25.

Where the parties had gone on dealing under the terms of a former agreement, which contained a clause for reference to arbitration, it was held the Court had jurisdiction (*Hattersley v. Hutten*, 3 F. & F. 116).

Cannot be pleaded in bar.

A defendant is not enabled by this section to plead an agreement to refer in bar to an action or suit, although he may, of course, plead the making of an award (*Cooke v. Cooke*, L. R. 4 Eq. 77).

The order a matter of discretion.

It is in all cases a matter of discretion for the Court whether they will stay an action under this section, and where the object of the defendant is to delay the plaintiff, no order will be made (*Lury v. Pearson*, 1 C. B. N. S. 639); so also, where the plaintiff *bona fide* alleged that the question raised was one of fraud, the Court refused to interfere (*Wallis v. Hirsch*, 1 C. B. N. S. 316). Where a contract contained a stipulation for referring disputes arising under it to the arbitration of parties residing in England, and an action was brought upon the contract in this country, the Court refused to refer the matter to the arbitrators named, upon the grounds that there was no provision in the stipulation for compelling the attendance of witnesses belonging to this country before the arbitrators, and that the question likely to arise was one as to facts existing in this country (*Macken v. Alexander*, 11 Ir. Jur. N. S. 372).

Except, however, in such cases as those referred to, the Court will be slow in withdrawing the matters in dispute from the mode of investigation which the parties themselves have selected (*Hirsch v. Im Thurm*, 4 C. B. N. S. 569).

The fact that the action pending is for a liquidated sum, admitted to be due, and that the defendant's claim is for damages for breach of a stipulation contained in the agreement, which cannot be pleaded as a set off to the plaintiff's demand, is no ground for refusing to stay the action (*Russell v. Pellegrini*, 6 El. & Bl. 1620; *Seligman v. Le Boutillier*, L. R. 1 C. P. 681); and see *Wickham v. Hardy*, 5 Jur. N. S. 871, in which case the claims on both sides were unliquidated in their nature, and as to the costs in such a case, see *Dunhill v. Ford*, L. R. 3 C. P. 36.

Where cross claims.

Costs.

When the instrument upon which the action was brought contained a stipulation that "if any difference should arise between the parties, either in principle or detail," the same should be referred, it was held to be no answer to an application to stay, that the difference was one of law as to the construction of the instrument (*Randegger v. Holmes*, L. R. 1 C. P. 679).

Where question of law.

15. If in any case of arbitration (j) the document authorizing the reference provide that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator; or if any appointed arbitrator refuse to act, or become incapable of acting, or die, and the terms of such document do not show that it was intended that such a vacancy should not be supplied, and the parties do not concur in appointing a new one; or if, where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, such parties or arbitrators do not appoint an umpire or third arbitrator; or if any appointed umpire or third arbitrator refuse to act, or become incapable of acting, or die, and the terms of the document authorizing the reference do not show that it was intended that such a vacancy should not be supplied, and the parties or arbitrators respectively do not appoint a new one; then in every instance any party may serve the remaining parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator respectively; and if within seven clear days after such notice shall have been served no arbitrator, umpire, or third arbitrator be appointed, it shall be lawful for the Court, or any Judge of any of the superior Courts of Law or Equity at *Dublin*, upon the application of the party having served such notice as aforesaid, to appoint an arbitrator, umpire, or third arbitrator, as the case may be, and such arbitrator, umpire, and third arbitrator respectively, shall have the like power to act in the reference and make an award as if he had been appointed by consent of all parties.

On failure of parties to appoint arbitrators, the Judge may appoint an arbitrator, umpire, or third arbitrator. 17 & 18 Vict. c. 125, s. 12.

Distinction between arbitration and valuation.

(j) An agreement for the appointment of a valuer, is not an agreement for arbitration within the meaning of the act (*Boss v. Helsham*, L. R. 2 Ex., 72; and see further, *Denham v. Bradford*, L. R. 5 Ch. 519, and p. 296, *post*, as to the distinction between the two classes of cases).

When reference is to two arbitrators, and one party fail to appoint, the other party may appoint an arbitrator to act alone. 17 & 18 Vict. c. 125, s. 13.

16. When the reference is or is intended to be to two arbitrators, one appointed by each party, it shall be lawful for either party, in the case of the death, refusal to act, or incapacity of any arbitrator appointed by him, to substitute a new arbitrator, unless the document authorizing the reference show that it was intended that the vacancy should not be supplied; and if on such a reference one party fail to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party shall have appointed an arbitrator, and shall have served the party so failing to appoint with notice in writing to make the appointment, the party who has appointed an arbitrator may appoint such arbitrator to act as sole arbitrator in the reference, and an award made by him shall be binding on both parties as if the appointment had been by consent; provided however, that the Court or a Judge may revoke such appointment on such terms as shall seem just (k).

When appointment may be made.

(k) In *Healy v. Healy*, 17 Ir. C. L. R. 649, it was held that after service of the notice prescribed by this section, it is necessary as a condition precedent to the appointment of a sole arbitrator, that seven clear days should elapse, upon any of which the opposite party may appoint an arbitrator, and therefore the time between the expiration of the time originally fixed for the making of the award, and the subsequent enlargement by order of the Judge of the time for making the award cannot be counted in the seven days.

When reference is to two arbitrators they may appoint an umpire. 17 & 18 Vict. c. 125, s. 14.

17. When the reference is to two arbitrators, and the terms of the document authorizing it do not show that it was intended that there should not be an umpire, or provide otherwise for the appointment of an umpire, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award, unless they be called upon by notice as aforesaid to make the appointment sooner (l).

Appointing umpire.

(l) Arbitrators may choose an umpire either before or after the time limited for making their own award, provided he is chosen within the time limited for his umpirage (*Harding v. Watts*, 15 East, 556). They may also appoint him before they enter upon the matter referred to them (*Roe v. Doe*, 2 T. R. 644).

The signing the appointment of an umpire is not a judicial act, and therefore need not be done by the arbitrators at the same time or together (*In re Hopper*, L. R. 2 Q. B. 367). An appointment of an umpire by lot from

two persons, each of whom is acknowledged by both arbitrators to be fit is valid (ib); if, however, the arbitrators do not use their judgment at all, but merely appoint by lot, the appointment is bad (*Re Cassell*, 9 B. & C. 624).

Where arbitrators not agreeing choose an umpire who made his umpirage, the fact of the arbitrators joining with him was held not to vitiate it (*Soulsby v. Hodgson*, 3 Burr. 1474). In *Healy v. Healy*, 17 Ir. C. L. R. 649, it was questioned whether the refusal of an arbitrator after hearing a part of the case to act further was such a disagreement as would authorize the interposition of an umpire. -

18. The arbitrator acting under any such document or compulsory order of reference as aforesaid, or under any order referring the award back, shall make his award under his hand, and (unless such document or order respectively shall contain a different limit of time) within three months after he shall have been appointed, and shall have entered on the reference, or shall have been called upon to act by a notice in writing from any party, but the parties may by consent in writing enlarge the term for making the award; and it shall be lawful for the Court of which such submission, document, or order is or may be made a rule or order, or for any Judge thereof, for good cause to be stated in the rule or order for enlargement, from time to time to enlarge the term for making the award; and if no period be stated for the enlargement in such consent or order for enlargement, it shall be deemed to be an enlargement for one month; and in any case where an umpire shall have been appointed it shall be lawful for him to enter on the reference in lieu of the arbitrators, if the latter shall have allowed their time or their extended time to expire without making an award, or shall have delivered to any party or to the umpire a notice in writing stating that they cannot agree (m).

Award to be made in three months unless parties or Court enlarge the time. 17 & 18 Vict. c. 125, s. 15.

(m) Previous to the present Act, the award should have been made within the time originally fixed, and if power to enlarge the time was not given by the submission, or the parties would not consent to an enlargement, the only case in which the Court could enlarge the time was, where the submission contained an agreement that it might be made a rule of one of the superior courts (3 & 4 Vict. c. 105, s. 63). In all cases where the submission is by an instrument in writing, the Court or a Judge thereof may now for good cause enlarge the time.

Within what time award to be made.

The above section provides, as will be observed, that the award is to be made, where no time is specially fixed, within three months after the appointment of the arbitrator and his entry upon the reference, or after being called upon so to do. The entry upon the reference spoken of here, means not the time when the arbitrator accepts the office, or takes upon himself the functions of an arbitrator by giving notice of his intention to proceed; but

when he enters into the matter of the reference, either with both parties before him, or under a peremptory appointment enabling him to proceed *ex parte* (*Baker v. Stephens*, L. R. 2 Q. B. 523.)

Enlarging
time.

Where the arbitrators made their award after the time specified, the Court enlarged the time, holding there was jurisdiction to do so, even though the arbitrator was *functus officio* at the time of the making of the award, and the application to enlarge was made after making the award (*In Re Warner*, L. R. 3 Eq. 261; *Lord v. Lee*, L. R. 3 Q. B. 404), and the award already made may be taken up by the party after the enlargement.

The Court has jurisdiction to enlarge the time, both under the present Act and 3 & 4 Vict. c. 105, s. 63, in the cases thereby provided for, even where the arbitrators have power to enlarge the time, but, nevertheless, allow it to run out without enlarging it (*McNeill v. Macneale*, 13 Ir. L. R. 154); and so, also, the time may be enlarged by the Court, although the power given to the arbitrators is limited, and the enlargement applied for is in excess of it (*Parkes v. Smith*, 15 Q. B. 297); and the Court has jurisdiction under the present section to enlarge the time when the reference takes place under the Land Clauses Consolidated Act (*Re Dare Valley Railway Co.*, L. R. 4 Ch. 354.)

When enlargement will not be granted.

As a general rule, however, the Court will not enlarge the time when a long period of time has been suffered to elapse, and the delay is not satisfactorily explained (*Re Dare Valley Railway Co. ubi supra*; *Doe v. Cannew*, 17 Jur. 347), neither will the time be enlarged when an alteration in the position of the parties has taken place, as by bankruptcy, death, etc. (*Goffney v. Killen*, 12 Ir. C. L. R. Ap. 25; *Edwards v. Davies*, 18 Jur. 448; and see *Bowen v. Williams*, 3 Ex. 93. In addition to the enlargement of the time, by consent in writing or order of the Court, the parties may by parol agreement, or by acts of acquiescence, enlarge the time (*Gillanders v. Rossmore*, 1 Jones, 504; *Tyerman v. Smith*, 6 E. & B. 719). In the latter case the reference was a compulsory one, and no time was fixed by the order for the making of the award, and it was held that, though more than three months had elapsed, yet the parties were bound, it appearing that they had treated the reference as subsisting within a month before the making of the award.

Enlargement by agreement.

Rule to deliver possession of land pursuant to award to be enforced as a judgment in ejectment: 15 & 16 Vict. c. 125, s. 16.

19. When any award made on any such submission, document, or order of reference as aforesaid, directs that possession of any lands or tenements capable of being the subject of an action of ejectment shall be delivered to any party, either forthwith or at any future time, or that any such party is entitled to the possession of any such lands or tenements, it shall be lawful for the Court of which the document authorizing the reference is or is made a rule or order to order any party to the reference who shall be in possession of any such lands or tenements, or any person in possession of the same claiming under or put in possession by him since the making of the document authorizing the reference, to deliver possession of the same to the party entitled thereto, pursuant to the award, and such rule or order to deliver

possession shall have the effect of a judgment in ejectment against every such party or person named in it, and execution may issue, and possession shall be delivered by the sheriff as on a judgment in ejectment (n).

(n) Formerly where an award directed possession of land to be delivered the making of the award did not operate as a conveyance (*Henry v. Kirwan*, 9 Ir. C. L. R. 459), and the legal title could only be perfected by a conveyance in the ordinary form. Now, however, the party is entitled to the same remedy as in case of an ejectment.

Effect of award upon interest in land.

20. Every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a rule of any one of the superior Courts of Law or Equity at *Dublin*, on the application of any party thereto, unless such agreement or submission contain words purporting that the parties intend that it should not be made a rule of Court; and if in any such agreement or submission it is provided that the same shall or may be made a rule of one in particular of such superior courts, it may be made a rule of that Court only; and if when there is no such provision a case be stated in the award for the opinion of one of the superior courts, and such Court be specified in the award, and the document authorizing the reference have not, before the publication of the award to the parties, been made a rule of Court, such document may be made a rule only of the Court specified in the award; and when in any case the document authorizing the reference is or has been made a rule or order of any one of such superior courts, no other of such Courts shall have any jurisdiction to entertain any motion respecting the arbitration or award (o).

Agreement or submission in writing may be made rule of Court, unless a contrary intention appear. 17 & 18 Vict. c. 126, s. 17.

(o) Previous to this enactment, a submission to arbitration might be made a rule of Court, under 10 Wm. c. 14, s. 1, which provides that "it shall and may be lawful for all merchants and traders, and others desiring to end any controversy, suit, or quarrel, controversies, suits, or quarrels, for which there is no other remedy but by personal action, or suit in equity by arbitration, to agree that their submission of their suit to the award or umpirage of any person or persons, should be made a rule of any of His Majesty's Courts of Record which the parties shall choose, and to insert such their agreement in their submission, or the condition of the bond or promise, whereby they oblige themselves respectively to submit to the award or umpirage of any person or persons: which agreement being so made and inserted in their submission or promise, or condition of their respective bonds, shall or may, upon producing an affidavit thereof, made by the witnesses thereunto, or any one of them, in the Court of which the same is agreed to

Making submission rule of Court under 10 Wm. 3, c. 14.

be made a rule, and reading and filing the said affidavit in Court, be entered of record in such Court, and a rule shall thereupon be made by the said Court, that the parties shall submit to, and finally be concluded by, the arbitration or umpirage which shall be made concerning them by the arbitrators or umpire, pursuant to such submission, and in case of disobedience to such arbitration or umpirage, the party neglecting or refusing to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of Court, when he is a suitor or defendant in such Court, and the Court, on motion, shall issue process accordingly, which process shall not be stopped or delayed in its execution by any order, rule, command or process of any other Court, either of law or equity, unless it shall be made appear on oath to such Court, that the arbitrators or umpire misbehaved themselves, and that such award, arbitration, or umpirage was procured by corruption or other undue means."

Under the Act of William, it will be observed that a submission could not be made a rule of Court, except where the parties specially provided that it might; but under the present section, every submission may be made so. Care must, however, be taken to distinguish between an agreement to refer a matter in dispute to arbitration and a mere agreement, as to the manner of valuation. The latter cannot be made a rule of Court. Where in an agreement for the sale of lands, it was provided that compensation should be given in case of any error in the description of the premises, and that the amount of such compensation should be settled by two referees, it was held that there was no agreement for arbitration (*Boss v. Helsham*, L. R. 2 Ex. 12); but where the lease of a farm contained a clause that if the premises should during the term be sold, the tenant should, if required by the landlord, quit, and the tenant and landlord should each appoint a valuer to estimate the compensation to be given to the tenant, it was held that the agreement was within the corresponding section of the English Common Law Procedure Act, 1854 (*In re Hopper*, L. R. 2 Q. B. 367); and see, further, *Dinham v. Bradford*, L. R. 5 Ch. 519; *Richardson v. Smith*, ib. 648, *In re The Anglo-Italian Bank* and *De Rosaz*, L. R. 2 Q. B. 452; *Parkes v. Smith*, 15 Q. B. 297, 309. See also *Bradford v. Manningham*, 3 F. & F. 88, in which it seems to have been doubted whether the present section is not confined to actions and suits in the superior courts which the parties have agreed to refer.

In order that a submission may be made a rule of Court under this section, it must be in writing. Where two parties agreed by deed to refer all matters in dispute to two arbitrators, one to be appointed by each, and after disputes had arisen, each appointed an arbitrator by parol, it was held that the submission was a parol submission (*In re Glaysher*, 3 H. & C. 442). Compare, however, with this case *Newton v. Hetherington*, 19 C. B. N. S. 342, and *In re Willcox*, L. R. 1 C. P. 671, whence it would appear that in such a case the submission may be made a rule of Court, and see sect. 15, *ante*.

In order that a submission may be made a rule of Court, it is further necessary that it should clearly appear that it has been signed by the party, or a duly authorized agent (*Re Henshaw & Falk*, 12 L. T. N. S. 638.) A married woman cannot be bound by a reference of disputes affecting freehold estate (*Strachan v. Dougall*, 7 Moore, P. C. C. 365); and see *McCan v. O'Farrell*, 3 C. O. F. 30. In *Henery v. Henery*, Batty, 125, it was held that an infant may maintain an action upon an award, see *Proudfoot v. Boyle*, 15 M. & W. 198; *Biddell v. Douse*, 6 B. & C. 255.

What agreements within statute.

Submission must be in writing.

Must be signed.

Who may agree to refer.

One partner cannot bind his co-partner by an agreement to refer (*Adams v. Bankart*, 1 C. M. & R. 681; *Stead v. Salt*, 3 Bing. 101).

As a general rule, parties may refer to arbitration any matters in dispute between them. Thus "all matters in difference" may be referred (see *Smith v. Miller*, 3 T. R. 624); and there is no objection to referring prospective differences (*Parkes v. Smith*, 15 Q. B. 297). A criminal charge cannot, however, be referred (*R. v. Hardey*, 14 Q. B. 529); but where a party has a remedy by action as well as by indictment, he may submit the adjustment of the reparation to arbitration (*Baker v. Townsend*, 7 Taunt. 422).

What may be referred.

As mentioned in the note to sect. 14, *ante*, p. 289, every submission to arbitration was revocable at common law. Where, however, the submission is within 10 Wm. 3, c. 14, the parties are prevented from revoking it by 3 & 4 Vict. c. 105, s. 63, but if the submission can be made a rule of Court under the present section only, the provisions of the Act last mentioned do not apply, and the submission is revocable (*Mills v. Bayley*, 2 H. & C. 36; *Thomson v. Anderson*, L. R. 9 Eq. 523; *Re Rouse v. Meier*, 19 W. R. 438); in which latter case it was held that a submission to arbitration not containing a provision that it may be made a rule of Court, is revocable by either party, though it has been made a rule of Court under the action of the English Common Law Procedure Act, 1854, corresponding to the present one.

Revoking submission.

It is therefore always desirable that a submission to arbitration should be drawn so as to fall within the provisions of the Act of William.

Assuming that a submission to arbitration has been duly entered into, and has not been revoked, either party may make it a rule of Court under the present section. Where the consent to refer relates to the matters in a cause actually pending, it may be made a rule of Court by side bar order, 139th G. O. 1854. In other cases, the agreement to refer must be made a rule of Court, by motion upon notice. The submission should be produced, but where it appeared, in a case under the Land Clauses Consolidated Act, that the original was in the possession of the opposite party, who refused to produce it, the Court acted on a verified copy (*Martin v. The Mayor of Belfast*, 12 Ir. L. R. 338).

How submission made a rule of Court.

Submission should be produced.

The execution of the submission should be properly verified, and in cases where the submission is made a rule of Court under the Act of Wm. 3, an affidavit of one of the witnesses is necessary; where, however, the witness refused to verify, the Court under the circumstances dispensed with the affidavit (*Shortall v. Moran*, 2 Ir. L. R. 87). See also, as to dispensing with an affidavit from the attesting witness, in cases where the submission is made a rule of Court under this section, *In Re Newton v. Hatherington*, 19 C. B. N. S. 342; and see as to compelling the witness to make an affidavit (*Nugent v. Lowe*, Bl. D. & Q. 220).

Proving execution.

As to the several requirements necessary in order that the award may be binding upon the parties, see *ante*, p. 284; as to the manner of enforcing it, see *ante*, p. 287; and as to the manner of setting it aside, see *ante*, p. 285.

As regards the costs of arbitration, the power of awarding them depends entirely upon the terms of the submission. Where a case was referred and it was agreed that the costs should abide the event, and the sum awarded (the demand being upon foot of a contract) was under £20, it was held that the parties had contracted themselves out of the provisions of sect. 243 of the Common Law Procedure Act, 1853, and the party succeeding was entitled to full costs (*Owens v. Vanhomrigh*, 14 Ir. C. L. R. 362), and see further,

Costs of arbitration.

Webb v. Sanderson, 8 L. T. N. S. 248; *Robertson v. Sterne*, 13 C. B. N. S. 248; *Cowell v. Ammon Company*, 34 L. J. Q. B. 161; *Harland v. Mayor of Newcastle*, L. R. 5 Q. B. 47.

When the order referring a cause, provided that the costs should abide the event of the award, and the arbitrator awarded that each party had a claim against the other, and set off one against the other, and directed the balance to be paid to the party having the larger claim, it was held, although the claims on both sides were unliquidated, that the party recovering the balance was entitled to the costs (*Dunhill v. Ford*, L. R. 3 C. P. 36).

Where the submission provides that the costs shall be in the discretion of the arbitrator, he may award costs, even where the action is one of contract, and the sum awarded is under £20 (*Cleary v. Cleary*, 10 Ir. C. L. R. 329); and if in such a case the award is silent as to costs, it will be bad (*Richardson v. Worsley*, 5 Ex. 613). Where in such a case the arbitrator directed the costs to be paid by the party to whom he found the balance to be due, the Court refused to interfere with his discretion (*Fearon v. Flynn*, L. R. 5 C. P. 34). Where the submission is silent as to costs, the arbitrator has no power over them (*Taylor v. Gordon*, 2 M. & Scott, 725; *Wilson v. Doolan*, 5 Ir. Jur. O. S. 135; *West London Railway Co. v. Fulham*, L. R. 5 Q. B. 361); if, however, the reference be of the matters in dispute in a cause, the arbitrator has power to adjudicate respecting the costs of the cause, but not of the reference or award; and each party must bear his own expenses of the reference, and is liable to half the costs of the award (*Firth v. Robinson*, 1 B. & C. 277; *Taylor v. Gordon*, 9 Bing. 570). As to sending back an award to an arbitrator that he may have an opportunity of certifying for costs, see *Harland v. Mayor of Newcastle*, L. R. 5 Q. B. 47; *Fitzpatrick v. Moylan*, 11 Ir. Jur. N. S. 292; and see as to the scale of taxation in reference to the attendance of counsel, the arbitrators' fees, &c., *Sinclair v. Great Eastern Railway Co.* L. R. 5 C. P. 135.

21. Upon the trial of any cause the addresses to the jury shall be regulated as follows:—The party who begins (*p*) or his counsel, shall be allowed, in the event of his opponent not announcing at the close of the case of the party who begins his intention to adduce evidence, to address the jury a second time at the close of such case, for the purpose of summing up the evidence; and the party on the other side, or his counsel, shall be allowed to open the case, and also to sum up the evidence (if any); and the right to reply shall be the same as at present (*q*).

(*p*) When a question as to the right to begin arises, the test to determine it is, "which side would be entitled to a verdict, supposing no evidence given on either side" (*Leete v. Gresham Insurance Co.*, 15 Jur. 1161). Thus where in an action by the indorsee of a bill of exchange against the drawer, want of consideration was pleaded, it was held that inasmuch as consideration is to be presumed until the contrary is shown, the defendant should begin (*Mills v. Barber*, 1 M. & W. 425). Where in an action of trespass, the defendant pleaded a right to a watercourse and entry to remove obstructions, upon which plea the plaintiff took issue; it was held that the Judge might properly allow the defendant to begin, unless the plaintiff undertook to prove

As to addresses of counsel to juries on trials of causes. 17 & 18 Vict. c. 123, s. 18.

Right to begin.

substantial damage (*Chapman v. Rawson*, 8 Q. B. 673). So, also, where in an action of covenant for the payment of money, the defendant pleaded that the deed was given to secure the payment of money lost at gambling, it was held that the defendant was entitled to begin (*Hill v. Fox*, 1 F. & F. 136). In an action upon the money counts, where the defendant pleaded affirmatively, it has been frequently held that the plaintiff must begin, for the claim being unliquidated, he must give evidence as to its amount (*Morris v. Loton*, 1 M. & Rob. 233; but see *Woodgate v. Potts*, 2 C. & Kir. 458. In such cases, however, the defendant by admitting the amount will entitle himself to begin (*Iacon v. Higgins*, 3 Stark, 178).

Action on the money counts.

There is an apparent exception to the rule stated above, in cases where damages of an unascertained amount are sought to be recovered. In such cases, if the defendant pleads affirmatively, the plaintiff in case no evidence were given by the defendant in support of his pleas would be entitled to a verdict for nominal damages at least, and the right to begin has consequently in such cases been frequently claimed by the defendant. As, however, the amount of damages in such cases is a substantial question as to which the plaintiff must give evidence, it has been determined that the plaintiff has the right to begin (*Carter v. Jones*, 1 M. & Rob. 281; *Pim v. The Eastern Counties Railway Co.*, 2 F. & F. 133, in which latter case the action was for negligence, and the only plea accord and satisfaction), and the rule is the same where the action is one of contract and the damages sought are unliquidated, as for instance, in actions for breach of promise of marriage (*Mercer v. Whall*, 5 Q. B. 447). Where, however, the damages are of ascertained amount, as in replevin, or must be nominal, the defendant will be entitled to begin where his pleas are in the affirmative (*Mercer v. Whall*, *ubi supra*, 465; *Lyons v. Fitzgerald*, Sm. & Bat. 405). The defendant may, however, by admitting the amount in such cases entitle himself to begin (*Bonfield v. Smith*, 2 M. & Rob. 519; *Tindall v. Baskett*, 2 F. & F. 644).

Where unascertained damages claimed.

Where the affirmative of any one material issue is on the plaintiff, and he undertakes to give evidence upon it, he has a right to begin as to all (*Rawlins v. Desborough*, 2 M. & Rob. 328; with which compare *Lyons v. Fitzgerald*, *ubi supra*). Where, however, to an action on a bill and an account stated, the defendant pleaded payment to the first, and a traverse to the second count, he was held not to be entitled to begin unless he undertook to give some evidence of an account stated besides the bill (*Smart v. Raynor*, 6 C. & P. 721).

Where several issues.

In ejectment the rule is that if the defendant admits so much of the plaintiff's case as would entitle the latter to recover, if his title were not displaced by the defendant, the defendant is entitled to begin (*Bernard v. Clune*, Ir. Cir. Rep. 826). Thus, if the plaintiff claims as heir, and defendant as devisee, the defendant by admitting plaintiff's pedigree and the dying seized entitles himself to begin (*Doe v. Smart*, 1 M. & Rob. 476; *Goodtitle v. Braham*, 4 T. R. 497). In order, however, to entitle himself to begin he must admit the *whole* without qualification, and where therefore the ejectment was brought by the heir against a person claiming under a conveyance from the ancestor, it was held that the defendant was not entitled to begin upon admitting the heirship of the plaintiff (*Doe v. Tucker*, M. & M. 536). So, also, where an ejectment is brought by a prior devisee against a subsequent one, the defendant is not entitled to begin upon admitting the execution of the will, under which the plaintiff claims (*French v. French*, 2 Ir. Jur. O. S. 21; *Doe v. Bryan*, 5 C. B. 655).

In actions of ejectment.

As to the right of a party to a new trial in consequence of an erroneous ruling of the Judge as to the right to begin, see *Doe v. Brayne*, *ubi supra*; *Ashby v. Bates*, 15 M. & W. 589; *Bradford v. Freeman*, 5 Ex. 734; *Lyons v. Fitzgerald*, Sm. & Bat. 405. A new trial in such a case is not a matter of strict right, but it will be granted whenever it appears that the party was prejudiced by the erroneous ruling.

Right of
reply.

(q) The party who begins is entitled to the reply if the opposite party calls witnesses. If the opposite party does not call witnesses the party beginning has in general no right to reply. If, however, the opposite party in stating his case puts forward a statement of facts material to the issue, not given in evidence when the statement is made, and which he declines to prove, it is in the discretion of the Judge to allow a reply (*Arundell v. Hayes*, 1 Huds. & B. 486; *Naish v. Browne*, 2 C. & K. 219; *Orerar v. Sodo*, M. & M. 85). Thus where defendant's counsel stated that several apologies had been offered which were all refused, but no witnesses were called for the defendant, plaintiff's counsel was allowed to reply (*Reordan v. Sullivan*, Ir. Cir. Rep. 346), and cf. *Clarke v. White*, *ib.* 523. Statements made, however, as matter of inference from the evidence previously given do not give a right of reply (*Magrath v. Browne*, Arm. Mac. & O. 8, 133).

Power to
Court or
Judge to
adjourn
trial. 17 &
18 Vict. c.
125, s. 19.

22. It shall be lawful for the Court or Judge, at the trial of any cause, where they or he may deem it right for the purposes of justice, to order an adjournment for such time and subject to such terms and conditions as to costs, and otherwise, as they or he may think fit (r).

Adjourning
trial.

(r) Previous to the passing of the present statute a Judge might postpone the trial of a cause before the trial began, but after that he had no power to adjourn the hearing. Under the above section he may now adjourn the hearing whenever it is proper to do so for the purposes of justice. Where a material witness of the plaintiff was absent the cause was adjourned on the terms of the defendant's costs of the day being part of his costs in the cause (*Bikker v. Beeston*, 1 F. & F. 685, 686); and see also *Cahill v. Dawson*, 1 F. & F. 291, in which case the trial was adjourned, on the terms of the defendant paying the costs of the day, and the same jury being summoned; and on the adjourned hearing the Judge read to the jury the notes of the preceding sitting. In the statement of the case on the part of the plaintiff a document in the hands of a third party appearing to be material, and he having declined to produce it, an adjournment was allowed for the purpose of serving a *subpoena duces tecum* (*Higginson v. Bank of England*, 1 F. & F. 450).

Where a party hesitated to consent to a reference, the Judge intimated that unless a reference was consented to he would adjourn the trial until the next assizes ((*Jones v. Beaumont*, 1 F. & F. 336).

Affirmation
instead of
oath in cer-
tain cases.
17 & 18 Vict.
c. 125, s. 20.

23. If any person called as a witness, or required or desiring to make an affidavit or deposition, shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the Court or Judge or other presiding officer, or person qualified to take affidavits or depositions,

upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following; *videlicet*,

"I *A. B.* do solemnly, sincerely, and truly affirm and declare, that the taking of any oath is, according to my religious belief, unlawful; and I do also solemnly, sincerely, and truly affirm and declare," &c.

Which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form (*rr*).

(*rr*) The provisions of this section apply both to Courts of criminal and civil judicature, sect. 98, *post*; and see, also, 32 & 33 Vict. c. 68, s. 4.

24. If any person making such solemn affirmation or declaration shall wilfully, falsely, and corruptly affirm or declare any matter or thing which if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such person so offending shall incur the same penalties as by the laws and statutes of this kingdom are or may be enacted or provided against persons convicted of wilful and corrupt perjury (*s*).

Persons making a false affirmation to be subject to the same punishment as for perjury. 17 & 18 Vict. c. 125, s. 21.

(*s*) The provisions of this section apply both to courts of criminal and civil judicature, sect. 98, *post*.

25. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the Judge prove adverse, contradict him by other evidence, or, by leave of the Judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement (*ss*).

How far a party may discredit his own witness. 17 & 18 Vict. c. 125, s. 21.

(*ss*) The provisions of this section apply both to courts of criminal and civil judicature, sect. 98, *post*, and see 28 Vict. c. 18, s. 3.

Previous to the present act the rule was, that a party calling a witness could not give general evidence to show that he was not to be believed upon his oath (*Ewer v. Ambrose*, 3 B. & C. 746); and in this respect the law has remained unaltered. It was also the rule, that a party might contradict the evidence of his own witness upon facts material to the issue (see *Melluish*

Discrediting party's own witness.

Contradicting him.

v. *Collier*, 15 Q. B. 878); as for instance, in cases where an attesting witness denied his signature; and although the above section seems to limit this privilege to cases where the witness proves adverse in the opinion of the Judge, yet it seems to have been the opinion of the Court in *Greenough v. Eccles*, 5 C. B. N. S. 786, that the present section was not intended to deprive a party of the liberty of proving his case by other witnesses as he might have done previously.

Proving
previous in-
consistent
statement
made by
witness.

As to proving that a witness has previously made a statement inconsistent with his present testimony, the better opinion previous to the present statute was that such evidence was not admissible, on the grounds of being mere hearsay evidence; but now by the above section the party is enabled to give such statement in evidence, by the leave of the Judge, whenever the Judge is of opinion that the witness is adverse. A witness whose testimony turns out to be unfavourable to the party calling him is not therefore an adverse witness within the meaning of this section; to make him an adverse witness, he must in the opinion of the Judge be adverse in the sense of showing a hostile mind (*Greenough v. Eccles*, 5 C. B. N. S. 786). Where a witness gave evidence differing from his previous statements to the attorney, the Judge allowed him to be examined as to his previous statements so made, and also allowed the attorney to be called to contradict him (*Amstell v. Alexander*, 16 L. T. N. S. 830). In *Faulkner v. Brine*, 1 F. & F. 254; the Judge under similar circumstances allowed the witness to be asked whether he had not made such contradictory statements and to be dealt with as adverse, but only with a view to discredit him generally. In *Reed v. King*, 30 L. T. 290; it was, however, stated by Pollock, C. B., that the present section was not meant to apply to the loose statements made by the witness to the attorney with a view to prepare the evidence, and the Court in that case granted a rule nisi for a new trial on the ground that witnesses had been called at the trial to prove such statements. A series of letters may be used for contradicting a witness, although one only be directly inconsistent (*Jackson v. Thomason*, 1 B. & S. 745.)

Discrediting
witnesses
produced by
opposite
party.

As regards witnesses called by the other side, a party may give general evidence to show that they are unworthy of credit (*The Queen v. Brown & Headley*, L. R. 1 C. C. 70); but he cannot prove particular facts in order to discredit them (*R. v. Watson*, 2 Stark, 152). Where a party called the attesting witness to a will whose evidence was unfavourable, it was held that though he could not be considered a hostile witness, yet he was produced to satisfy the requirements of law, and was not to be regarded as the witness of the party producing him; and that the party producing him might put questions to other witnesses tending to throw doubts upon his general credibility (*Coles v. Coles*, 35 L. J. Prob. 40); and see further, *Jackson v. Thomason*, *ubi supra*. Evidence going to show that the plaintiff or his agent has by word or act admitted his case to be bad, is admissible without calling the plaintiff or his agent (*Moriarty v. London Chatham and Dover Railway Co.*, L. R. 5 Q. B. 314).

Proof of con-
tradictory
statements
of adverse
witness. 17 &
18 Vict. c.
126, s. 23.

26. If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof

can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he has made such statement (t).

(t) The provisions of the present section apply both to courts of criminal and civil judicature, sect. 98, *post*, and see 28 Vict. c. 18, s. 4.

Previous to the present statute, a party might give evidence to show that a witness produced by the opposite party had previously made statements relative to the subject matter of the cause inconsistent with the testimony given by him, provided a foundation was laid for such evidence by asking the witness whether he had not made such contradictory statements (*The Queen's Case*, 2 B. & B. 301). It was, however, doubtful whether such evidence was admissible when the witness merely stated that he did not remember having made the statement, but any doubt upon the matter is now removed by the above section.

In order to render such evidence admissible, the witness must be asked as to the time, place, and person involved in the supposed contradiction. It is not sufficient merely to ask him whether he has ever said so and so (*Angus v. Smith*, M. & M. 474, per Tindal, C. J.). In *The Queen v. Connors*, 4 Ir. Jur. N. S. 263, it was held by the Court of Criminal Appeal, that counsel for a prisoner may, under this section, ask a witness on cross-examination whether he had not before the magistrate described the person who had committed the crime with which the prisoner was charged as answering a particular description, and on the witness stating that he does not recollect, he may under the following section give parol evidence of the alleged statement without producing and reading any part of the witness's deposition.

Laying foundation for proof of contradictory statement.

27. A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject matter of the cause, without such writing being shown to him; but if it is intended to contradict such witness by writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of contradicting him: Provided always, that it shall be competent for the Judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit (u).

Cross-examination as to previous statement in writing. 17 & 18 Vict. c. 125, s. 24.

(u) The provisions of this section apply both to courts of criminal and civil judicature, sect 98, *post*, and see 28 Vict. c. 18, s. 5.

Previous to the present statute, upon the grounds that the contents of a written document can only be proved by the writing itself, it was held in *The Queen's Case*, 2 B. & B. 286, that a witness could not be cross-examined as to previous statements made by him in writing, unless the writing was shown to him and the whole document put in evidence. Now, however, the

Proving previous contradictory statement.

witness may be examined as to such previous statement without producing the originals (*Sladden v. Serjeant*, 1 F. & F. 322); but if he denies having made the statement, his attention must be called to the contradictory portion of it, if it is intended to give it in evidence.

In *Henman v. Lester*, 12 C. B. N. S. 776, it was held that a party to an action may be asked in cross-examination for the purpose of testing his credit, whether an action has not been brought against him in an inferior court of record upon a similar claim and a verdict against him has not been returned by the jury, he having given evidence in the cause, and this may be done without the production and proof of the record of that Court. And see *The Queen v. Connors*, referred to in the note to the last section, as to the nature of the evidence that may be given of the previous contradictory statements in writing.

The provisions of the above section only apply to statements made by the witness himself in writing. He cannot therefore be cross-examined as to statements in writing made to him by third parties, see *Macdonnell v. Evans* 11 C. B. 930.

Proof of previous conviction of a witness may be given. 17 & 18 Vict. c. 125, s. 25.

28. A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor, and, upon being so questioned, if he either denies the fact, or refuse to answer, it shall be lawful for the opposite party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the Clerk of the Court, or other officer having the custody of the records of the Court where the offender was convicted, or by the deputy of such clerk or officer (for which certificate a fee of five shillings and no more shall be demanded or taken), shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same (v).

(v) The provisions of the present section apply both to courts of criminal and civil judicature, sect. 98, *post*, and see 28 Vict. c. 18, s. 6. In *Reg. v. Parsons*, L. R. 1 C. C. 24, it was held that the certificate of a previous conviction required by 5 Geo. 4, c. 84, s. 24 (which section is almost similar in terms to the above section) is sufficient, by virtue of 8 & 9 Vict. c. 113, s. 1 (*post* in the Appendix), if it purports to be signed by an officer having the custody of the records, although that officer is therein described as the deputy clerk of the peace of a borough; and that the certificate need not aver that the quarter sessions at which the prisoner was convicted were held by the Recorder.

Attesting witness need not be called, except in certain cases. 17 & 18 Vict. c. 125, s. 26.

29. It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved by

admission, or otherwise, as if there had been no attesting witness thereto (*w*).

(*w*) The provisions of the present section apply both to courts of criminal and civil judicature, sect. 98, *post*, and see 28 Vict. c. 18, s. 70.

Attesting witness.

Previous to the passing of the present Act, it was a settled rule that whenever a deed or other instrument was subscribed by attesting witnesses, one of them at least should be called to prove the execution; and so strong was the rule that it was held that the plaintiff could not prove the execution of an attested deed by the testimony in open Court of the defendant who executed it, nor examine such defendant as to the contents of it (*Whyman v. Garth*, 8 Ex. 803).

By the above section this rule has been altered as to instruments, to the execution of which an attesting witness is not necessary.

Where, however, as in the case of a will, an attesting witness is necessary, the instrument, &c., must be proved as before the statute, *i. e.*, by the evidence of the attesting witness, and the old law must therefore be occasionally referred to. Where however, the attesting witness is dead (*Anon.*, 12 Mod. 607; *Montgomery v. Joyce*, 1 Cr. & Dix, 422); or absent in a foreign country (*Prince v. Blackburn*, 2 East, 252); or where he cannot be found after diligent inquiry (*Jury v. Mark*, 2 Ir. O. S. 276; *Spooner v. Payne*, 4 C. B. 328); secondary evidence will be admissible; and so, also, where it appears that he is colluding with the opposite party, such evidence will be received (*Keating v. Smith*, Bl. D. & O. 159).

Where evidence of attesting witness dispensed with.

30. Comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness, or otherwise, of the writing in dispute (*x*).

Comparison of disputed writing. 17 & 18 Vict. c. 125, s. 27.

(*x*) The provisions of the present section apply both to courts of criminal and civil judicature, sect. 98, *post*, and see 28 Vict. c. 18, s. 8.

Formerly the rule of law was, that where witnesses were produced for the purpose of proving handwriting, it was necessary that their acquaintance with the handwriting should not have been acquired pending the litigation, for the purpose of proving or disproving the handwriting in question (*The Fitzwalter Peerage Case*, 10 Cl. & F. 193; *Doe v. Suckermore*, 5 Ad. & E. 703). By the above section that rule has been altered.

Proving handwriting.

Where the question in a cause was as to the genuineness of the signature to a bill, other documents, such as receipts not relevant to the issue, but proved to be in the handwriting of the defendant, were allowed to be put in for the purpose of comparison (*Birch v. Ridgway*, 1 F. & F. 270). On the cross-examination of an attesting witness to a codicil, he denying that it was in his hand-writing, other documents admitted by him to be in his writing, were allowed to be submitted to the jury for the purpose of comparison of handwriting (*Cresswell v. Jackson*, 2 F. & F. 24). Where the question was whether a memorandum was in the handwriting of a defendant, and in the

course of cross-examination he was got to write something on a piece of paper, this was allowed to be shown to the jury for the purpose of comparison (*Cobbett v. Kilminster*, 4 F. & F. 490).

Where an anonymous letter, not regularly proved, was casually handed to a witness without the attention of the Court, or the opposite counsel being called to it, and was made use of for the purpose of comparison of handwriting, whereupon the plaintiff denied that the letter was in his handwriting, the Court set aside a verdict had for the defendant (*Egan v. Cowan*, 2 Ir. Jur. N. S. 394). In the same case the Court intimated that the genuineness of a document not in issue and used solely for the purpose of comparison, is a question for the Judge and not for the jury, and the decision of the Judge upon the point may be reversed by the Court above.

Certified copy of will to be sufficient evidence.

31. In any action at law or suit in equity where, according to the existing law, it would be necessary to produce and prove an original will or other testamentary instrument in order to establish a devise or other testamentary disposition, probate or letters of administration of such will or other testamentary instrument, or a copy thereof purporting to be certified as a true copy by some officer of the testamentary Court in which the same shall have been lodged, shall be sufficient evidence of such will or other testamentary instrument and its contents; provided that the party intending to produce such probate, letters of administration, or copy shall have given seven days' notice of such his intention to the opposite party, and unless the party receiving such notice shall, within three days thereafter, by a counter notice, require the production and proof of the original will or other testamentary instrument (y).

Probate or office copy to be evidence of the will in suits concerning real estate, save where the validity of the will is put in issue. (C.O. & 21 Vict. c. 77, s. 64, Eng).

(y) This section has been repealed by 20 & 21 Vict. c. 79, s. 70. By sect. 68 of that Act, it is, however, enacted that, "in any action at law or suit in equity, when, according to the existing law, it would be necessary to produce and prove an original will in order to prove a devise or other testamentary disposition, of or affecting real estate, it shall be lawful for the party intending to establish in proof such devise or other testamentary disposition, to give to the opposite party seven days, at least, before the trial or other proceeding in which the said proof shall be intended to be adduced, notice that he intends at the said trial or other proceeding, to give in evidence as proof of the devise or other testamentary disposition, the probate of the said will, or the letters of administration with the will annexed, or a copy thereof stamped with any seal of the Court of Probate, and in every such case such probate, or letters of administration, or copy thereof respectively, stamped as aforesaid, shall be sufficient evidence of such will, and of its validity and contents, notwithstanding the same may not have been proved in solemn form, or have been otherwise declared valid in a contentious cause or matter as herein provided, unless the party receiving such notice shall, within three days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition."

At Common Law in order to prove a devise of lands the will itself should be produced, for probate of the will was not even secondary evidence. This, however, has been altered by the enactment referred to above.

How will proved at Common Law.

If the requisite notice be given under the above enactment of the intention of the party to give the probate, &c., in evidence, and the opposite party does not give the counter-notice prescribed, he may, nevertheless, at the trial dispute the validity of the will, for "sufficient evidence" only means *prima facie* evidence (*Barracough v. Greenough*, L. R. 2 Q. B. 612). When the notice required is given and no counter-notice served, probate of a will obtained prior to the passing of the Act and sealed with the seal of the Probate Court is admissible, and does not require to be sealed with the seal of the Probate Court (*Irwin v. Callwell*, 12 Ir. C. L. R. 144). The notice must specify the particular purpose for which the probate is to be given in evidence (*Cope v. Mooney*, 9 Ir. Jur. N. S. 184, overruling upon this point *Irwin v. Callwell*, *ubi supra*). The notice in question should be given to the attorney of the opposite party (*Barracough v. Greenough*, *ubi supra*). For a form of notice, see Field Dunn and Biddle's Chancery Forms, 730. Probate of a will is not admissible evidence under this section to prove the appointment of a testamentary guardian (*Cope v. Mooney*, 9 Ir. Jur. N. S. 184).

Where no counter-notice served

Form of notice.

32. Provided always, that in case any such counter-notice shall be served, it shall be lawful for the party intending to produce such probate, letters of administration, or copy, to apply to the Court or a Judge for an order that such probate, letters of administration, or copy shall be deemed and taken as sufficient evidence of such will or other testamentary instrument, and its contents, and thereupon the Court or Judge may make such order in relation thereto as may be fit, and the said Court or Judge may thereupon determine by whom the costs of such application shall be paid, and upon what terms, if any, such will or other testamentary document shall be produced (z).

Court or Judge may, on application to such Court or Judge for such purpose, order certain documents to be taken as sufficient evidence of will, &c.

(z) This section has been repealed by 20 & 21 Vict. c. 79, s. 70.

33. In every case in which, after the notices mentioned in the last section, the original will or other testamentary instrument shall be produced and proved, it shall be lawful for the Court or Judge before whom such evidence shall be given to direct by which of the parties the costs thereof shall be paid (a).

As to costs of proof of will.

(a) This section has been repealed by 20 & 21 Vict. c. 79, s. 70, and in its place it is enacted by sect. 69 of the same Act, that "in every case in which in any such action or suit, the original will shall be produced and proved, it shall be lawful for the Court or a Judge before whom such evidence shall

be given to direct by which of the parties the costs thereof shall be paid." A similar provision is contained in the English Probate Act, 20 & 21 Vict. c. 77, s. 65.

Provision as to documents produced at trial and not sufficiently stamped. 17 & 18 Vict. c. 125, s. 28.

34. Upon the production of any document as evidence at the trial of any cause, it shall be the duty of the officer of the Court whose duty it is to read such document to call the attention of the Judge to any omission or insufficiency of the stamp; and the document, if unstamped, or not sufficiently stamped, shall not be received in evidence until the whole or (as the case may be) the deficiency of the stamp duty, and the penalty required by statute, together with the additional penalty of one pound, shall have been paid (b).

Stamping documents at trial.

(b) The provisions of the present section only apply to such documents as might have been stamped in the ordinary way up to the period of the trial, and they do not therefore extend to cases where the document in question should have been stamped at the time of the execution or within a limited period afterwards (*Londonderry Steamboat Co. v. Middleton*, 7 Ir. C. L. R. 361).

In *Connor v. Cronin*, 7 Ir. C. L. R. 480, it was held that a stamped copy of a lost unstamped original document cannot be received in evidence. This case has, however, been doubted (*Herbert v. Rae*, 13 Ir. Ch. 25).

Officer of the Court to receive the duty and penalties, and pay them over to the Inland Revenue. 17 & 18 Vict. c. 125, s. 29.

35. Such officer of the Court shall, upon payment to him of the whole, or (as the case may be) of the deficiency of the stamp duty payable upon or in respect of such document, and of the penalty required by Statute, and of the additional penalty of one pound, give a receipt for the amount of the duty or deficiency which the Judge shall determine to be payable, and also of the penalty, and thereupon such document shall be admissible in evidence, saving all just exceptions on other grounds; and an entry of the fact of such payment, and the amount thereof, shall be made in a book kept by such officer; and such officer shall, at the end of each sittings or assizes (as the case may be), duly make a return to the Commissioners of Inland Revenue of the monies, if any, which he has so received by way of duty or penalty, distinguishing between such monies, and stating the name of the cause and the parties from whom he received such monies, and the date, if any, and description of the document, for the purpose of identifying the same; and he shall pay over the said monies to the Receiver General of the Inland Revenue, or to such person as the said Commissioners shall appoint or

authorize to receive the same; and in case such officer shall neglect or refuse to furnish such account, or to pay over any of the monies so received by him as aforesaid, he shall be liable to be proceeded against in the manner directed by the eighth section of an Act passed in the Session of Parliament holden in the thirteenth and fourteenth years of the reign of Her present Majesty, intituled, *An Act to repeal certain Stamp Duties, and to grant others in lieu thereof, and to amend the laws relating to the Stamp Duties*; and the said Commissioners shall, upon request, and production of the receipt hereinbefore mentioned, cause such documents to be stamped with the proper stamp or stamps in respect of the sums so paid as aforesaid: Provided always, that the aforesaid enactment shall not extend to any document which cannot now be stamped after the execution thereof on payment of the duty and a penalty.

If officer neglect to pay over monies he shall be proceeded against as directed by 13 & 14 Vict. c. 57.

36. No document made or required under the provisions of this Act shall be liable to any stamp duty.

No document to require a stamp. 17 & 18 Vict. c. 123, s. 30.

37. No new trial shall be granted by reason of the ruling of any Judge that the stamp upon any document is sufficient, or that the document does not require a stamp (c).

No new trial for ruling as to sufficiency of stamp. 17 & 18 Vict. c. 125, s. 31.

(c) It has been held that the Judge should not reserve a question for the Court above as to whether an instrument is properly stamped or not (*Siordet v. Kuczinski*, 17 C. B. 251); and even where the parties consent, it would appear that the question should not be reserved, and that under the above section the Court has no jurisdiction to entertain any motion upon a point reserved upon the stamp law (*Heiser v. Grout*, 5 H. & N. 35); but see *Eames v. Smith*, 1 Jur. N. S. 1025. In *Herbert v. Beyhan*, 8 Ir. C. L. R. Ap. 55, it was, however, held that if a question arose at *Nisi Prius* as to the liability of a document to stamp duty, the Judge may reserve the question for the opinion of the Court, and order a conditional judgment of the stamp duty and penalty; and such a judgment is not a determination of right in favour of the Crown.

Reserving question as to stamp.

If the Judge refuses to admit a document on the ground of an instrument being insufficiently stamped, his ruling is open to review (*Sharples v. Rickards*, 2 H. & N. 57).

38. Error may be brought upon a judgment upon a special case stated under this Act in any award in the same manner as upon a judgment upon a special verdict, unless the parties agree to the contrary; and the proceedings for bringing such special case before the Court of Error shall, as nearly as may be, be the same as in the case of a special verdict; and the Court of Error shall either affirm the judgment or give the

Error may be brought on a special case. 17 & 18 Vict. c. 125, s. 32.

same judgment as ought to have been given in the Court in which it was originally decided, the said Court of Error being required to draw any inferences of fact from the facts stated in such special case which the Court where it was originally decided ought to have drawn (d).

(d) This section differs from the corresponding English section, in expressly providing for special cases stated under the Act, "in any award." Under the English Act error does not lie upon the judgment upon a special case stated by an arbitrator (*Gumm v. Fowler*, 2 E. & E. 890).

Grounds to be stated in rule nisi for new trial. 17 & 18 Vict. c. 125, s. 33.

39. In every rule Nisi for a new trial or to enter a verdict or nonsuit, the grounds upon which such rule shall have been granted shall be shortly stated therein (e).

(e) This and the following sections deal with motions for a new trial, and for leave to enter a verdict or nonsuit upon a point reserved. Formerly no appeal lay from the order of the Court upon applications of this description, but now under sects. 40 and 41, an appeal may be brought in the cases therein provided for.

New trial.

A motion for a new trial is the remedy applicable where a miscarriage of justice has taken place at the trial. Where the contention of the party is, that notwithstanding the finding of the jury he is entitled to the judgment of the Court, his course is to move in arrest of judgment, or for judgment *non obstante veredicto*, as to which see *ante*, p. 192. In place of moving for a new trial in cases where that remedy is applicable, the party aggrieved may in certain cases tender a bill of exceptions, as to which, see *ante*, p. 135. Where a party moves for a new trial, he will not in general, be allowed to proceed at the same time with a bill of exceptions involving the same question (*Bloomfield v. Johnson*, 13 Ir. C. L. R. Ap. 57; *Butler v. Mountgarrett*, 1 Ir. Jur. N. S. 474); nor will he be allowed upon such a motion to impeach the validity of his adversary's pleadings (*Lysaght v. Delacour*, 8 Ir. C. L. R. 453).

Grounds on which granted.

As to the grounds upon which a new trial may be applied for, see Broom's Commentaries, 3rd ed., p. 206; where most of the cases are collected. As a general rule, the grounds upon which a new trial will be granted, are (1), in consequence of a mistake on the part of the Judge; (2) the default or misconduct of the opposite party; (3) the default or misconduct of the jury, and (4), where though the verdict is not open to objection upon any of the grounds just mentioned, yet a new trial is necessary in order that complete justice may be done.

Misdirection.

As regards the first of the grounds referred to above, a new trial will generally be granted when the Judge has misdirected the jury. A misdirection consists in the mis-statement to the jury of some legal principle involved in the case, or submitting as the basis of their verdict questions immaterial, irrelevant, or not warranted by the evidence, or not sufficiently explaining the law involved in the case (see *Elliott v. The South Devon Railway Co.*, 2 Ex. 725; in which case a new trial was granted in consequence of the Judge not having sufficiently defined the word "town" at the trial). When a mis-

direction has taken place a new trial will be granted, unless it is clear that the result would have been the same had the direction been proper. Thus where there is an established rule by which the jury should be governed in the measure of damages, it is the duty of the Judge to bring it to their notice, and his omitting to do so is ground for a new trial, although the point was not taken at the trial (*Knight v. Egerton*, 7 Ex. 407; *Hadley v. Bazendule*, 23 L. J. Ex. 179); and the Court has no discretion in the matter (*Parker v. Cuthcart*, 17 Ir. C. L. R. 778); and in general, if any mistake be made at the trial, for which a bill of exceptions might have been tendered (*ante*, p. 135), and a note of the objection was then and there taken, the Court will grant a new trial (*Bernasconi v. Farebrother*, 1 B. & Ad. 372). Even where there has been no misdirection, but it, notwithstanding, appears that the jury may have misunderstood the Judge, and may consequently have been misled, a new trial will be granted, although no objection was taken to the charge at *Nisi Prius* (*Thomson v. Millar*, 1 Ir. R. 1 C. L. 90). Where, however, the erroneous ruling complained of is upon a collateral point only, as to which a bill of exceptions could not have been tendered, a new trial will not be granted as of right, but only in the event of a failure of justice (*Black v. Jones*, 6 Ex. 213; *Clarke v. Arden*, 16 C. B. 227). Where the Judge had misdirected the jury as to one of the items in the plaintiff's demand, and the plaintiff's counsel on the motion for a new trial coming on to be heard, consented to abandon that part of his demand to which the misdirection applied, the Court without the defendant's assent, ordered judgment to be entered for the reduced amount (*Moore v. Tuckwell*, 1 C. B. 607). A nondirection by the Judge is no ground for a new trial, unless a failure of justice has taken place (*Ford v. Lacey*, 30 L. J. Ex. 351); and where in an action of ejectment the defendant did not rely upon the Statute of Limitations at the trial, it was held that he could not set it up upon a motion for a new trial (*Latouche v. Penninck*, 10 Ir. Jur. N. S. 321).

Non direction.

If the Judge without the consent of the parties discharges the jury from finding upon a material issue, it will be ground for granting a new trial (*Tinkler v. Rowland*, 4 A. & E. 868). He may, however, discharge the jury from finding upon an issue, which the finding upon other issues render immaterial (*Tisdall v. Parmell*, 14 Ir. C. L. R. 1). Where the Judge has improperly admitted or rejected evidence, the Court will, in general, grant a new trial; if, however, it clearly appears, that without the evidence so admitted there was enough to warrant the verdict of the jury, or that the evidence so rejected would not have altered the case, or that it would not have established any fact not already proved, a new trial will not be granted (*Doe v. Tyler*, 6 Bing. 561; *Alexander v. Barker*, 2 Tyr. 140; *White v. Dowling*, 8 Ir. L. R. 128; *Boyd v. McCardie*, Sm. & B. 431). In order, moreover, to entitle a party to a new trial on the ground of the rejection of evidence, it must appear, not merely that it was offered and not received, but that the Judge was given to understand that its reception was pressed, and that he deliberately rejected it (*Whitehouse v. Hemmant*, 27 L. J. Ex. 295). It will also be a ground for directing a new trial if the Judge has allowed the case to go to the jury when he should have directed a nonsuit. It is in every case the duty of the Judge to determine, as a preliminary question, whether there is any evidence to go to the jury in support of the plaintiff's case (*Ryder v. Womwell*, L. R. 4 Ex. 32); and in determining such question, the well settled rule is, that it is not sufficient that there should be some

Discharging the jury from finding.

Improper admission or rejection of evidence.

Where no evidence to go to jury.

Directing
nonsuit.

evidence to go to the jury, but that there should be such evidence as the jury can properly find a verdict upon (*Giblin v. M'Mullen*, L. R. 2 P. C. 317). A nonsuit may be directed even after the defendant has entered upon his case, and evidence given by the latter may be used for the purpose of a nonsuit (*ib*). Unless the Judge at the trial reserves liberty for the defendant to move to enter a nonsuit, the Court *in banc* cannot order a nonsuit to be entered, and the only course open, will be to direct a new trial (*Minchin v. Clement*, 1 B. & Ald. 252); and see further, *Reeves v. Morris*, Arm. Mac. and Og. 159; *Corsar v. Reed*, 21 L. J. Q. B. 18. Formerly the rule was that where the plaintiff submitted to be nonsuited, as that was his voluntary act, he could not afterwards complain; it is now, however, settled, that if he submits to be nonsuited in deference to the opinion of the Judge, on a question of law, he may move for a new trial (*Alexander v. Barker*, 2 C. & J. 133); but if he elects to be nonsuited the rule is different (*Butler v. Dorant*, 3 Taunt. 229). Where the Judge informed the jury of the amount of damages necessary to carry costs, it was held to be no ground for directing a new trial (*Twyman v. Knowles*, 13 C. B. 222; and see *Kilmore v. Abdoolah*, 27 L. J. Ex. 307). As to granting a new trial for an incorrect ruling as to the right to begin, see *ante*, p. 300; for an incorrect ruling as to the stamp upon a document, *ante*, p. 309, and for stopping defendant's counsel in his statement of the matters proposed to be proved (*Listowel v. Gibbins*, 8 Ir. C. L. R. 290).

Informing
jury what
damages
carry costs.

Misconduct of
successful
party.

If the party in whose favour the verdict has been given, has tampered with the jury, it will of course be ground for granting a new trial, and where a plaintiff who was subpoenaed as a witness failed to attend, a verdict found in his favour was set aside (*Mayo v. Bentley*, 11 Ir. Jur. N. S. 221; and see *King v. Kelk*, 20 L. T. N. S. 974); and see further as to setting aside a verdict for the misconduct of the party or his agent (*Carey v. Walsh*, 8 Ir. Jur. N. S. 36). Where plaintiff's counsel informed the jury of the amount of damages necessary to carry costs, a new trial was directed (*Poole v. Whiscombe*, 3 F. & F. 79; *Russell v. Wenewser*, Ir. R. 2 C. L. 427).

Improper
jury.

If the jury who tried the cause be not properly empanelled, as for instance, if a person not upon the panel be sworn upon it, it will be ground for granting a new trial, if the mistake was discovered and objection made before verdict (*Doe v. Michael*, 16 Q. B. 620; *Dovey v. Hobson*, 6 Taunt. 460); if, however, the party moving had notice of the fact and did not object, the application will be refused (*Pryme v. Tidmarsh*, 10 M. & W. 605; *Adair v. Malone*, Batty, 557). As to setting aside a verdict on account of the disqualification of one of the jury, see *Peermain v. Mackay*, 9 Jur. 491. Where it appeared in an action against a committee-man that one of the jury was also a member of the committee, and had been previously sued in respect of the claim, the verdict was set aside, but upon the terms of the plaintiff paying the costs of the trial, it appearing that his attorney was aware of the jurymen's interest (*Bailey v. Macaulay*, 13 Q. B. 815). Where a public company is a party to an action, the mere fact that one of the jurymen was a shareholder in the company, is no ground for granting a new trial (*Williams v. Great Western Railway Co.*, 3 H. & N. 869). A judgment upon a writ of inquiry was set aside because the jury was returned by the attorney for the plaintiff (*Baylis v. Lucas*, Cowp. 112). The Court will not, however, necessarily set aside a verdict upon this ground (*Mason v. Vickery*, 1 Smith, 304; *Briggs v. Sowton*, 9 Dowl. 105; *Brunskill v. Giles*, 9 Bing. 13); and see *ante*, p. 123.

If the jury misconduct themselves, as for instance, if they decide their verdict by lot it will be ground for granting a new trial (*Harvey v. Hewitt*, 8 Dowl. 598); but the Court will not receive the evidence of a member of the jury for the purpose of showing that they have so conducted themselves, and the fact of their having done so must be otherwise shown (*S. C.* and see *Straker v. Graham*, 4 M. & W. 721; *Vaise v. Delaval*, 1 T. R. 11. Where food and drink were supplied to a jury after retiring, the Court under the circumstances set the verdict aside (*Cooksey v. Haynes*, 27 L. J. Ex. 371). It is ground for a new trial if a juror before being sworn expresses a determination to give a verdict one way (*Ramadge v. Ryan*, 9 Bing. 333). Where two of the jury dined and slept at the house of the defendant on the evening of the first day of the trial, the Court held that it was discretionary with them whether they should set the verdict aside or uphold it, and under the circumstances of that case they refused to set it aside (*Morris v. Vivian*, 10 M. & W. 137). Where some of the jurors during the progress of the trial went and inspected the *locus in quo* in the presence of one of the parties, the verdict was set aside (*Tyrrell v. Bristolow*, Alc. & Nap. 398). The fact of one of the jury being a relation of the successful party, and being on terms of intimacy and friendship with him, is no ground for setting aside the verdict (*Onions v. Naish*, 7 Price, 203.)

Misconduct of jury.

One of the most usual grounds upon which a new trial is sought for is that the verdict is against the weight of evidence. In such cases, unless the Judge who tried the case reports that he is dissatisfied with the verdict, the Court will not, except in a strong case, disturb the verdict, see *Irwin v. Callwell*, 12 Ir. C. L. R. 144. When the evidence is conflicting, a new trial will seldom be granted, unless the evidence against the verdict very strongly preponderates (*Ashley v. Ashley*, 2 Str. 1142); and see further as to the principles on which the Courts act when a new trial is applied for upon the ground of being against evidence *Dutch v. Power*, Ir. R. 1 C. L. 192 (where the subject is very fully discussed); *Irwin v. Callwell*, *ubi supra*; *Assignees of Taylor v. Thompson*, Ir. R. 4 C. L. 129; *Bright v. Eynon*, 1 Bur. 390. As a general rule it may be laid down that in every case in which the verdict has turned upon a question of fact which has been submitted to a jury, and there is no objection to the verdict, except that it is alleged to have been found against the weight of evidence, the Court will exercise, not merely a cautious but a strict and sure judgment, before they send the case to a second jury. The general rule is, that the verdict once found shall stand, the setting it aside is the exception, and ought to be an exception of rare and almost singular occurrence (*Mellin v. Taylor*, 3 Bing. N. C. 109, 111, *per* Tindall, C. J.). As to granting a second new trial see *Dutch v. Power*, *ubi supra*; *Swinerton v. The Marquis of Stafford*, 3 Taunt. 232).

Where verdict against evidence.

In addition to the several grounds referred to above, there are several others upon which a new trial will be granted. Thus it will be granted upon the grounds of surprise, even though the party applying has not elected to be nonsuited at the trial (*Green v. Handcock*, Ir. R. 4 C. L. 295). It will not, however, be granted merely because the unsuccessful party has neglected properly to instruct his attorney (*Tharpe v. Stallwood*, 5 M. & G. 760); and see further as to granting a new trial upon the grounds of surprise *Douglas v. Ewing*, 6 Ir. C. L. R. 359; *Carey v. Walsh*, 8 Ir. Jur. N. S. 36; *Knox v. Lucan*, 5 Ir. L. R. 96. A new trial will also be granted upon the ground of newly discovered evidence. If, however, the new evidence might by the exercise of due diligence have been obtained and produced upon

Surprise.

Newly discovered evidence.

the former trial, a new trial will not be granted (*Cahill v. Hartnett*, 10 Ir. C. L. R. 439); and see further as to granting a new trial on the ground of newly discovered evidence *Dickenson v. Blake*, 7 Bro. P. C. 177; *Broadhead v. Marshall*, 2 W. Bl. 955; *Gambart v. Mayne*, 14 C. B. N. S. 320; *O'Grady v. Dwyer*, 10 Ir. C. L. R. 440; in the latter of which cases the principles on which the Court acts in granting a new trial upon the ground referred to are discussed.

Discretion-
ary with
Court.

Ejectment.

As before mentioned the granting of a new trial is generally a matter for the discretion of the Court, and if therefore the rights of the party will not be concluded by a refusal to grant it, the Court will be slow in disturbing a verdict already obtained. For this reason a new trial will be rarely granted in an action of ejectment, where the verdict has been in favour of the defendant, on the ground of the verdict being against the weight of evidence (*Tighe v. Hickey*, Ir. R. 1 C. L. 343; *Rowley v. Reilly*, 8 Ir. Jur. N. S. 69; and see *Cole* on Ejectment, p. 330). If the cause of action is under £20, the action is considered as trifling, and a new trial will not be granted unless the Judge has misdirected the jury, or has received or rejected evidence improperly (*Tidd*, N. Pr. 541, where the reason of the rule is stated; *Guinness v. Burr*, Hay. & Jon. 735). So, also, the Court will not grant a new trial to enable the plaintiff to recover nominal damages (*Purcell v. Nolan*, 1 Ir. L. R. 258; *Anon. v. Phillips*, 1 Cr. & M. 26); and the rule as to refusing a new trial where the cause of action is trifling, is not, it would appear, affected by sect. 50 of the present Act (*Hawkins v. Alder*, 18 C. B. 640). Where, however, the sum in question amounts to the precise sum of £20 (*Dyball v. Duffield*, 1 Chit. Rep. 265 (a)), or the object of the action is to try a right of a permanent nature, the rule does not apply (*Turner v. Lewis*, *ib.* 265).

Entering
verdict or
non-suit.
Cannot be
entered
unless leave
reserved.

If the Judge at the trial reserve leave to enter a verdict or nonsuit, the party against whom the verdict has been directed to be entered may apply accordingly. As before mentioned, however, unless such leave be reserved, the only power which the Court possesses is to direct a new trial. If leave be reserved, the Court may, in the exercise of its direction, in place of entering a verdict or nonsuit, direct a new trial, if such be necessary, for the purpose of doing complete justice between the parties (*Tyrrell v. The Irish Society*, 14 Ir. C. L. R. 493; and see *Owen v. De Beauvoir*, 16 M. & W. 547); and no appeal lies from the decision of the Court awarding a new trial in such a case (*Abbott v. Feary*, 6 H. & N. 113; *Breslow v. Reynolds*, 2 Jur. N. S. 790). When a nonsuit was directed by the Judge with leave reserved to the plaintiff to move to enter the verdict for him upon the findings of the jury upon certain questions left to them, it was held that the defendant in showing cause against a rule obtained pursuant to such leave might contend that the findings of the jury were against the weight of evidence, that he might do so without giving notice of his intention to raise such question; and that he might therefore contend that in place of entering a verdict for plaintiff a new trial should be directed (*Walker v. Cory*, L. R. 4 Ex. 152). There is a distinction between the practice in this country and in England upon applications of this description which should be borne in mind. In England, whenever the Judge at the trial reserves liberty to have the verdict entered for the plaintiff or defendant, not having submitted any question to the jury, it is always implied in such reservation that the Court is to be at liberty to draw such inference from the facts as in their opinion the jury ought to have drawn, if the question had been submitted to them. In Ireland, however, it appears that the practice is different (*Murphy v.*

Where
findings
against
evidence.

Drawing
inference of
fact where
no finding.

Murphy, 15 Ir. C. L. R. 205, 215). Where leave is reserved by a Judge at *Nisi Prius* to enter a nonsuit, the Court will, notwithstanding the leave reserved being thus restricted in point of form, order a verdict to be entered for the defendant on one issue, without disturbing the verdict found for the plaintiff on another, if that course seems most consistent with doing justice between the parties (*Winterbottom v. Derby*, L. R. 2 Ex. 316).

The course to be adopted in cases where an application is made for a new trial or for leave to enter a verdict or nonsuit is prescribed by the General Orders of 11th January, 1854, G. Os., 88-91, which see. The application must be made within the first four days of the term next after the trial unless when it has taken place in term, and it must then be made within the first four sitting days after the trial. The application is in the first instance made *ex parte*. The application is to be supported by affidavit when the party moving relies upon surprise or fatality, or upon the discovery of new evidence, or upon the verdict or nonsuit having been obtained by fraudulent or improper practice or misconduct. In all other cases the application is to be grounded on the certificate of the leading counsel at the trial. The order if made will be a conditional one, and must be served on the attorney of the opposite party, who will then have to serve notice of motion to discharge the order. As provided by the present section the conditional order should state shortly the grounds upon which it has been granted, and a report of the trial will have to be obtained from the Judge who tried it. As to extending the time for moving for a new trial see *Bloomfield v. Johnston*, 8 Ir. Jur., N. S., 93, where the time was extended in consequence of the length of the counsel's certificate; and see also *Gambart v. Mayne*, 14 C. B., N. S., 320; *Willis v. Bennett*, Barnes, 443; *Cunningham v. Montgomery*, 1 Ir. Jur., N. S., 50. Where counsel's certificate contains something not in the Judge's report, it will not therefore be rejected (*Fawcett v. Townsend*, 10 Ir. Jur., N. S., 117). The certificate must be signed by the leading counsel, although where it is impossible to have it so signed, the Court may dispense with the signature (*Byrne v. The Chester and Holyhead Railway Company*, 1 Ir. Jur., N. S., 174, 511). No affidavit or statement will be received for the purpose of contradicting the Judge's report (*Atkinson v. Mills*, 8 Ir. Jur., N. S., 92; *Rez v. Grant*, 3 N. & M., 106). Where the conditional order for a new trial purported to have been obtained on the ground of misdirection, and on argument it turned out that it should have been because the verdict was against evidence, the Court, notwithstanding, in the exercise of its discretion granted a new trial (*Gardiner v. Power*, 6 Ir. Jur., N. S., 399). Where there have been separate verdicts for plaintiff and defendant upon separate issues it would appear that the Court has power to direct a new trial on one of the issues (*Mohan v. Bloomfield*, 6 Ir. Jur., N. S., 101).

As to moving for a new trial after the death of one of the parties to the action, see *ante*, p. 187, and as to the costs of the application, &c., see section 50, *post*, and the note thereto.

40. In all cases of rules to enter a verdict or nonsuit upon a point reserved at the trial, if the rule to show cause be refused or granted and then discharged or made absolute, the party decided against may appeal (✓).

(✓) It will be observed that when a point is reserved at the trial, the

Practice as to applying.

Extending time for moving.

Certificate of counsel.

Judge's report.

If rule *nisi* refused, party may appeal. 17 & 18 Vict. c. 125, s. 34.

Appealing
where point
reserved.

party decided against may appeal without the leave of the Court, while on the other hand, when a new trial is applied for, the party decided against can only appeal in the cases provided for by the next section. An appeal lies under the present section from the decision of the Court in an interpleader issue (*Green v. Letterkenny Railway Co.*, Ir. R. 3 C. L. 160.)

No appeal
where new
trial ordered.

Where leave is reserved to reduce or to increase the amount of a verdict, an appeal may be brought from the decision of the Court (*Seeger v. Duthie*, 8 C. B. N. S. 72; *Hodgman v. West Midland Railway Co.*, 5 B. & S. 173). Where the Court in place of entering a verdict or nonsuit directs a new trial (see *ante*, p. 314), no appeal lies under this section (*Bristow v. Reynolds*, 2 Jur. N. S. 790; *Abbott v. Feary*, 6 H. & N. 113). Where the rule for a new trial dropped in consequence of the Judges being equally divided in opinion, it was held that the party who obtained the rule might appeal (*Leri v. Green*, 4 Jur. N. S. 86). It is not necessary it would appear, in order to give a right of appeal that the order should be made absolute in the terms in which it was granted (*Gether v. Capper*, 18 C. B. 866).

Practice as to
appealing.

When a party appeals under this section, his first step is to serve the notice of appeal prescribed by sect. 43. Having served notice of appeal, the next step is to state a case as provided by sect. 45. When the case is stated it will have to be printed, and a sufficient number of copies lodged in the office of the clerk of the errors, after which the cause will be set down in its turn. As to appealing from the refusal of the Court below to grant a conditional order, see sect. 46, *post*; as to the superseding of execution, sect. 44; as to the judgment to be given by the Court of Appeal, sect. 47; and as to the costs of the appeal, sect. 48.

A suggestion of error and an appeal under this section may be argued together (*Wheelton v. Hardisty*, 8 E. & B. 232).

Appeal upon
rule dis-
charged or
absolute. 17
& 18 Vict. c.
125, s. 35.

41. In all cases of motions for a new trial upon the ground that the Judge has not ruled according to law, if the rule to show cause be refused, or if granted be then discharged or made absolute, the party decided against may appeal (*g*), provided any one of the Judges dissent from the rule being refused, or, when granted, being discharged or made absolute, as the case may be, or, provided the Court in its discretion think fit that an appeal should be allowed (*h*); provided, that where the application for a new trial is upon matter of discretion only, as on the ground that the verdict was against the weight of evidence or otherwise, no such appeal shall be allowed (*i*).

Appealing
where
motion for a
new trial.

(*g*) See the note to the last section. As to giving leave to appeal upon a point which was not discussed below, see *Seed v. Higginson*, 8 H. L. Cas. 550. Where the Court below in the exercise of its discretion has declined to grant a new trial, the Court of Appeal will not in general exercise a counter-discretion (*Gibson v. Doeg*, 7 L. T. N. 871).

(h) It is not necessary to serve notice of the application for liberty to appeal (*O'Reilly v. Richardson*, 17 Ir. C. L. R. 86).

(i) See *O'Neill v. Bell*, Ir. R. 2 C. L. 74. No appeal lies where the question before the Court is as to the propriety of an amendment made by the Judge at the trial (*Ward v. McKelvey*, 7 Ir. Jur. N. S. 409). As to the right to appeal in consequence of an alleged non-direction upon a question of fact, see *Holden v. Merdach*, 27 L. J. Ex. 27. An allegation in the Court of Error that the verdict at the trial was, upon the whole, unsatisfactory, is not a ground for disturbing the verdict of the Court below (*Hayes v. Dexter*, 13 Ir. C. L. R. 22).

Does not lie where matter in discretion of Court.

Where a rule *nisi* was granted to enter a verdict upon a point reserved, and also for a new trial, on the ground of the verdict being against the weight of evidence, the Court deferred the argument of the latter part of the rule until the first part of it was finally disposed of by the Court of Appeal (*Betts v. Menzies*, 28 L. J. Q. B. 361, 11 W. R. 88). As to restraining a party from proceeding with a new trial pending an appeal from the order of the Court awarding it, see *ante*, p. 112.

42. The Court of Exchequer Chamber and the House of Lords shall be Courts of Appeal for the purposes of this Act.

As to Courts of Appeal. 17 & 18 Vict. c. 123, s. 86.

43. No appeal shall be allowed unless notice thereof be given in writing to the opposite party or his attorney, and to the Master of the Court, within four days after the decision complained of, or such further time as may be allowed by the Court or a Judge (j).

Notice of Appeal. 17 & 18 Vict. c. 123, s. 37.

(j) The Court will be slow in extending the time within which notice of appeal is to be served (*Norris v. Lawder*, 8 Ir. C. L. R. Ap. 47; *Kelner v. Baxter*, L. R. 2 C. P. 174); and sufficient reason should not merely be shown to account for the default, but it should also be shown that had the Court possessed a discretionary power originally to allow the appeal, it would have been exercised in favour of the appellant (*Watson v. Lane*, 25 L. J. Ex. 240). As instances of cases where the Court has enlarged the time for appealing, see *Ward v. Lumley*, 5 H. & N. 656; *Montgomery v. Middleton*, 8 Ir. Jur. N. S. 93.

Extending time for service of notice of appeal.

Leave to appeal may be given after the expiration of the period of four days prescribed above (*Ward v. Lumley*, *ubi supra*).

44. Notice of appeal shall be a stay of execution, provided bail to pay the sum recovered and costs, or to pay costs where the appellant was plaintiff below, be given, in like manner and to the same amount as bail in error, within eight days after the decision complained of, or before execution delivered to the sheriff (k).

Bail. 17 & 18 Vict. c. 123, s. 33.

(k) See *ante*, p. 202; where see also as to the practice in reference to bail in error, and as to compelling a party appealing to give security for costs. As to

paying out to the party who has succeeded in the Court below money lodged in Court, see *Greene v. The Letterkenny Railway Co.*, Ir. R. 3 C. L. 160.

Form of appeal. 17 & 18 Vict. c. 125, s. 39.

45. The appeal hereinbefore mentioned shall be upon a case to be stated by the parties (and in case of difference, to be settled by the Court or a Judge of the Court appealed from), in which case shall be set forth so much of the pleadings, evidence, and the ruling or judgment objected to, as may be necessary to raise the question for the decision of the Court of Appeal (*l*).

Settling case.

(*l*) When the parties differ as to the form of the case, it must be settled by the Court or a Judge of the Court. If the party appealing is guilty of default in making up the books, the opposite party may, it appears, apply for leave to mark final judgment (*Hunt v. Allgood*, 3 F. & F. 155).

Rule nisi granted on appeal, how disposed of. 17 & 18 Vict. c. 125, s. 40.

46. When the appeal is from the refusal of the Court below to grant a rule to show cause, and the Court of Appeal grant such rule, such rule shall be argued and disposed of in the Court of Appeal (*m*).

Appeal where conditional order refused.

(*m*) In such cases notice of appeal must be served, and a case stated as in other cases of appeal. According to the practice in England, where the Court below has refused to grant a rule nisi for a new trial, or to enter a verdict upon leave reserved, and there is an appeal against such refusal to the Court of Exchequer Chamber, that Court will grant a rule nisi, if they think fit to do so, against which cause must be shown in the first instance, only one counsel being heard on each side (*Kingsford v. Merry*, 1 H. & N. 503).

Court of Appeal to give judgment of Court below. 17 & 18 Vict. c. 125, s. 41.

47. The Court of Appeal shall give such judgment as ought to have been given in the Court below; and all such further proceedings may be taken thereupon as if the judgment had been given by the Court in which the record originated (*n*).

(*n*) See sect. 178 of the Common Law Procedure Act, 1853.

Powers of Court of Appeal as to costs and otherwise. 17 & 18 Vict. c. 125, s. 42.

48. The Court of Appeal shall have power to adjudge payment of costs (*o*), and to order restitution (*p*), and they shall have the same powers as the Court in which the record originated in respect of awarding process and otherwise.

Costs where appeal brought.

(*o*) By the preceding section it is provided that the Court of Appeal shall give such judgment as the Court below should have given; and, therefore, as regards the costs of the trial and new trial motion, the Court of Appeal must award them as the Court below should have awarded them. As

regards the costs of the appeal, the appellant, if successful, is not, as a general rule, entitled to them, and the only costs to which he is entitled are such costs as should have been awarded to him below (*Young v. Moeller*, 6 & El. Bl. 681, and see sect. 50, *post*). If, on the other hand, the appellant fails, he is liable for the costs of the appeal (*Barker v. Windle*, 6 El. & Bl. 675). In *Walker v. Bartlett*, 2 Jur. N. S. 643, it was held that the rule with regard to costs under the present enactment is the same as in cases in error, as to which see *post*, in the Appendix, p. xlviii. If the Court of Appeal is equally divided, the decision of the Court below stands. As to the costs in such a case, see *Dansey v. Richardson*, 3 El. & Bl. 722.

(p) The powers of the Court of Appeal as to awarding restitution are more extensive than those possessed by the Court of Error. See *ante*, p. 206, note (b).

Restitution.

49. Upon an award of a trial *de novo* by any one of the superior courts, or the Court of Exchequer Chamber, upon matter appearing on the record, error may at once be brought; and if the judgment in such or any other case be affirmed in error, it shall be lawful for the Court of Error to adjudge costs to the defendant in error (q).

Error upon award of trial *de novo*. 17 & 18 Vict. c. 125.

(q) The present section was passed for the purpose of removing doubts which formerly existed as to whether error could be brought upon an award of a *venire de novo*.

50. When a new trial is granted on the ground that the verdict was against evidence, the costs of the first trial shall abide the event, unless the Court shall otherwise order (r).

Payment of costs upon new trial on matter of fact. 17 & 18 Vict. c. 125, s. 44.

(r) The present section provides only for cases where the new trial has been granted on the grounds of the verdict being against the weight of evidence. In such cases, if the order of the Court is silent as to costs, and if the party successful at the first trial succeeds upon the second trial also, he is entitled to the costs of both trials. If, however, the party ultimately successful has failed upon the first trial, he is not, where the order is silent, entitled to the costs of the first trial, notwithstanding that the words of the above section would seem to warrant a different conclusion (*Wallis v. Great Southern and Western Railway Company*, 1r. R. 4 C. L. 81; *Evans v. Robinson*, 11 Ex. 40). Where a new trial is obtained on the ground of misdirection, or for a mistake on the part of the Judge, the rule is different, and the party ultimately successful is entitled to the costs of both trials, the first trial being regarded as abortive (*Powell v. Atlantic Steam Company*, 7 Ir. Jur. N. S. 118; *Pilson v. Johnson*, 6 Ir. C. L. R. 509; *Sinclair v. Barnett*, 1 Ir. L. R. 46).

Costs of trial where verdict against evidence.

Where misdirection.

The costs, however, in cases where a new trial is sought for, are in the discretion of the Court, and the order usually provides expressly for them. Thus, where the new trial is granted on the ground of the verdict being against the weight of evidence, the order occasionally provides that each

In the discretion of the Court.

party shall abide his own costs of the former trial (*Parker v. Cathcart*, 11 Ir. Jur. N. S. 49; *Dolan v. Gorman*, 6 Ir. Jur. N. S. 366), or the question of costs is reserved (*Green v. Handcock*, Ir. R. 4 C. L. 295). Formerly it appears that the general rule was that a party could only set aside a verdict as being against the weight of evidence, in cases where the conduct of the jury was not impeached, upon the terms of paying the costs of the first trial (*Dutch v. Power*, Ir. R. 1 C. L. 192, 206); and in such cases the payment of costs was a condition precedent to proceeding to another trial (*Nicholls v. Bozon*, 13 East, 185); and see further *Thomson v. Millar*, Ir. R. 1 C. L. 90, in which case a new trial was granted upon the same terms, the grounds upon which it was granted being that the jury might have been misled by the Judge's charge.

Costs of the motion.

Where a conditional order for a new trial is made absolute, if the absolute order is silent as to costs, the costs of the motion will be costs in the cause for the party obtaining the absolute order (*Bewley on Costs*, p. 80). The costs are, however, in the discretion of the Court (*Daly v. Colbert*, 3 Ir. L. R. 355). The costs of resisting an unsuccessful application for a new trial are costs in the cause (*Eyre v. Thorpe*, 6 Dowl. 768), unless the order is made after judgment, when, if the order be silent as to costs, neither party is entitled to them (*Newton v. Boodle*, 4 C. B. 359). Where, upon a motion for a new trial, the plaintiff consents to a reduction of the damages, and the order is consequently not made absolute, neither party pays to the other the costs of the motion (*Hussey v. Metropolitan Railway Company*, 20 L. T. N. S. 612). When the Court are equally divided in opinion upon the motion to show cause against a conditional order for a new trial, and the conditional order consequently drops, neither party is entitled to the costs of the motion (*Dunsey v. Richardson*, 23 L. J. Q. B. 361).

The costs of motions to enter a verdict or nonsuit, pursuant to leave reserved, follow the same rules as those of motions for a new trial, and are, generally speaking, costs in the cause. They are, however, in the discretion of the Court (*Daly v. Colbert*, *ubi supra*).

Power to Court or Judge to direct oral examination of witnesses. 17 & 18 Vict. c. 125, s. 46.

51. Upon the hearing of any motion it shall be lawful for the Court or Judge, at their or his discretion, and upon such terms as they or he may think reasonable, from time to time to order such documents as they or he may think fit to be produced, and such witnesses as they or he may think necessary to appear, and be examined *viva voce* , either before such Court or Judge, or before the master, and upon hearing such evidence, or reading the report of such master, to make such rule or order as may be just (s).

Compelling attendance of witness.

(s) An arbitrator may, under this section, be ordered to attend before the master to be examined as to when he had extended the time for making his award, he having refused to make an affidavit (*Roberts v. Evans*, 34 L. J. Q. B. 7). As to compelling a witness to a deed of submission to arbitration to prove the execution of the submission, see *Nugent v. Lowe*, Bl. D. & O. 220.

52. The Court or Judge may by such rule or order, or any subsequent rule or order, command the attendance of the witnesses named therein, for the purpose of being examined, or the production of any writings or other documents to be mentioned in such rule or order; and such rule or order shall be proceeded upon in the same manner, and shall have the same force and effect, as a rule of the Court under the Act of the 3rd & 4th Vict., ch. 105; and it shall be lawful for the Court, or Judge, or master to adjourn the examination from time to time as occasion may require; and the proceedings upon such examination shall be conducted, and the depositions taken down, as nearly as may be, in the mode now in use with respect to the *viva voce* examination of witnesses under the last-mentioned Act (t).

Proceedings before and upon such examination. 17 & 18 Vict. c. 125, s. 47.

3 & 4 Vict. c. 105.

(t) As to the practice upon such an examination see *Cockerell v. Van Diemens' Land Company*, 16 C. B. 256. And see as to the *viva voce* examination of witnesses, 3 & 4 Vict., ch. 105, ss. 69-75, *post*, in the Appendix.

53. Any party to any action, suit, or other civil proceedings in any of the superior Courts, requiring the affidavit of a person who refuses to make an affidavit, may apply by notice for an order to such person to appear and be examined upon oath before a Judge or master as to the matters concerning which he has refused to make an affidavit; and the Court or Judge may make such order for the attendance of such person before the Judge or master appointed to take such examination, for the purpose of being examined as aforesaid, and for the production of any writings or documents to be mentioned in such order, and may therein impose such terms as to such examination, and the costs of the application and proceedings thereon, as shall appear just (u).

Examination of person who refuses to make an affidavit. 17 & 18 Vict. c. 125, s. 48.

(u) See *ante*, note (s) to section 51.

54. Such order shall be proceeded upon in like manner as an order made under the herein-before mentioned act of the 3rd & 4th Vict., ch. 105, and the examination thereon shall be conducted, and the depositions taken down and returned, as nearly as may be, in the mode now used on *viva voce* examinations under the said Act of Parliament.

Proceedings upon order for examination as under 3 & 4 Vict. c. 105. Sec. 49.

Power to
Court or
Judge to
order produc-
tion of docu-
ments. 17 &
18 Vict. c.
125, s. 50.

55. Upon the application of either party to any action, suit, or other civil proceeding in any of the superior Courts, upon an affidavit by such party of his belief that any document, to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party, it shall be lawful for the Court or Judge to order that the party against whom such application is made, or if such party is a body corporate, that some officer to be named of such body corporate, shall answer on affidavit, stating what documents he or they has or have in his or their possession or power relating to the matters in dispute, or what he knows as to the custody they or any of them are in, and whether he or they objects or object (and if so, on what grounds,) to the production of such as are in his or their possession or power; and upon such affidavit being made the Court or Judge may make such further order thereon as shall be just (*v*).

Former
powers of in-
spection and
production.

(*v*) Previous to the present act the Courts of law had power on the application of either party to compel the opposite party to allow an inspection of documents in his custody or within his control in all cases where equity would grant a discovery (14 & 15 Vict., ch. 99, section 6, *post*, in the Appendix); and if necessary, the party inspecting might be allowed to take an examined copy. By sect. 64 of the C. L. P. Act, 1856, it was furthermore provided that a party might demand the production, inspection, or copy of any deed or instrument relied upon by the opposite party in his pleadings, or whereof inspection could be had by means of a bill of discovery. The present section, as will be observed, confers additional powers, for under it the Court may compel the party to state on oath what documents he has in his possession or power relating to the matters in dispute, and what he knows as to the custody they or any of them are in, and the power so conferred is not confined to the cases where discovery may be enforced.

Common law
jurisdiction of
enforcing
production of
documents.

Before referring to any of the numerous cases in which the above statutory powers of inspection and discovery have been enforced, it is well to bear in mind that, independent of statute, the courts of common law have in certain cases jurisdiction to compel a party to an action, to allow an inspection of documents. The cases in which the Court may enforce this equitable power are where the documents in question are relied upon in the pleadings, or where the opposite party can be considered as holding them under a trust, express or implied, for the party applying. If an action, or the defence to an action, is founded on an instrument, and it appears that only one copy of the instrument was made, the party who has possession of it holds it under an implied trust to produce it when necessary to the other party, and will be ordered to produce it for the inspection of his adversary (*Bluck v. Gompertz*, 7 Ex. 67). Thus the production for purposes of inspection of the promissory note on which an action is brought will be ordered (*Taylor v. Quinton*, 2 Ir. Jur. O. S. 72); or of a lease upon the

Where only
one copy of
instrument.

covenants contained in which the plaintiff is suing (*Beasley v. Tyrrell*, 1 Ir. C. L. R. 365), provided a counterpart was not executed, for if two parts of an agreement were interchangeably executed, the principle does not apply, even when the party applying has lost his part (*Street v. Brown*, 6 Taunt. 302; *Murphy v. Fitzpatrick*, 3 Law Rec. O. S. 161).

Again, upon the principle referred to, it was held that a defendant was entitled under the common law jurisdiction of the Courts to have an inspection of letters, which, in the course of a negotiation for taking a farm, he, as agent for his brother, had written to the plaintiff, but of which he had kept no copies, it being shown that the claim in the action was founded upon such letters, and that the inspection was necessary for his defence thereto (*Price v. Harrison*, 8 C. B. N. S. 617; and see *Cuffe v. Wilson*, 16 Ir. C. L. R. Ap. 4); and the principle has been extended so as to include every case where there is but one copy of an instrument on which an action, or the defence to an action, is founded, and the party seeking to inspect, though not a party to the instrument, in point of fact, may be considered to be such in point of interest (*Owen v. Nickson*, 3 El. & El. 602, 607). Thus, in an ejectment for forfeiture by breach of the covenants in a lease, a party not denied to be in lawful possession was allowed inspection of the lease, though it did not appear he was in possession under it (*Doe v. Roe*, 1 E. & B. 279); and see *Andrew v. Pell*, L. R. 2 C. P. 251, in which case an execution creditor was held to be entitled at common law to an inspection of an inspectorship deed, by which the debtor had assigned his interest to trustees.

On the same principle, where an action is brought by a principal against an agent, the agent will be compelled to allow an inspection of the books of the principal in his possession (*Jones v. Palmer*, 4 Dowl. 446).

Where, however, the party holding the document, &c., does not hold it as a trustee, or *quasi* trustee, for the party applying, there is no power at common law to order production for the purpose of inspection. Accordingly an inspection of letters, written by the plaintiff to the defendant, and returned by the latter, and which he alleged contained a release of his promise, was refused in an action for breach of promise of marriage, the plaintiff not being considered to be a trustee, for their production to the defendant (*Goodliff v. Fuller*, 14 M. & W. 4). See, however, as to this case, 8 C. B. N. S. 629, *per Williams, J.*, and in ordinary actions for breach of promise of marriage, the Court will order a production of the letters between the parties, where such production appears to be necessary and material to enable the parties to make out their case (*Chute v. Blennerhasset*, 16 Ir. C. L. R. Ap. 9; *Stone v. Strange* 3 H. & C. 541).

Again, on the principle that production would be enforced only in cases where the party holding the instrument could be looked upon as a *quasi* trustee, the Court refused in an action of trespass, where the plaintiff claimed under a conveyance from an ancestor of the defendant, to compel him to produce or give the latter a copy of the deed (*Pickering v. Noyes*, 1 B. & C. 262). Neither would an order to produce be made where it was sought for the purpose of enabling the party applying to plead in abatement (*Beale v. Bird*, 2 D. & R. 419); or where there is an allegation of forgery (*Daly v. Kelly*, 4 Ir. L. R. 16; *Chetwind v. Marnell*, 1 B. & P. 271; but see *Woolner v. Devereux*, 9 Dowl. 672).

It was furthermore necessary that the party applying should have a direct interest in the instrument (*Powell v. Bradbury*, 4 C. B. 541); and that the purpose for which it was required was to enable the party to maintain

Letters.

Agents' books.

When production not enforced at common law.

In actions for breach of promise of marriage.

Title deeds.

his claim or defence (*Steadman v. Arden*, 15 M. & W. 587); and if the application was a mere fishing one, it would be refused (*Shadwell v. Shadwell*, 6 C. B. N. S. 689). It was also necessary that the document should be in the possession of the party, although a lien of the party's attorney or agent was no answer (*Ley v. Barlow*, 1 Ex. 801; *Hunter v. Leathley*, 10 B. & C. 858).

Document should be in possession of party to suit.

As a general rule, the production for the purposes of inspection, of a document in the possession of a third party, could not be enforced (*Cocks v. Nash*, 3 M. & Sc. 164), unless, perhaps, the third party claimed under the opposite party (*Doe v. Roe*, 1 M. & W. 207).

Profert and oyer.

Since the abolition of *profert* and *oyer* (*ante*, p. 63), the Court will order inspection of a deed relied on by the defendant in his plea though it is a disclosure of his title (*Penarth Railway Co., v. Cardiff Waterworks Co.*, 7 C. B. N. S. 816).

Powers of discovery.

As regards the statutory powers now possessed by the Court, it will be observed that the earlier statutes only permitted inspection, but gave no powers of discovery, and the inspection permitted was of such documents only of which a discovery could have been obtained in equity. The present section, however, enables the Court or a Judge to enforce discovery, and inasmuch as the party is bound to state on oath what documents he has in his possession or power relating to the matters in dispute, or what he knows as to their custody, and as the Court or Judge may make such further order upon such affidavit being made as shall be just, it would appear that the power of the Court is not limited to cases where discovery would have been enforced in equity, although the Court will, in general, act upon the same principles. No general rule can be laid down as to when a discovery and inspection will be ordered, further than that the Courts are disposed to exercise liberally the powers conferred upon them. It must, however, appear that the instruments of which a production is sought are material and relevant to the issues between the parties, and that the production is not sought merely for the purpose of discovering something unfavourable to the opposite party and relating exclusively to his case (*Rayner v. Alhusen*, 2 L. M. & P. 605; *Adams v. Lloyd*, 3 H. & N. 351; *Houghton v. London and County Assurance Co.*, 17 C. B. N. S. 80; and see *Hunt v. Hewitt*, 7 Ex. 236). The power moreover will not be exercised except for the purpose of assisting a *bond fide* existing suit (*Temperley v. Willett*, 6 El. & Bl. 380); and no order for inspection will be made in favour of a plaintiff who seeks it not in order to support his own case, but to see whether any, and if so, by what means any defence can be made out against him (*Shadwell v. Shadwell*, 6 C. B. N. S. 679); and the granting of the application rests in the discretion of the Court or Judge (*Lancashire Cotton Spinning Co. v. Greatoroz*, 14 L. T. N. S. 290).

When not enforced.

When enforced.

Where in an action against an insurance company, the defendants pleaded that the assured at the time of the effecting of the assurance made an untrue representation, they were ordered to produce the representations so alleged to have been made (*Germaine v. The Athenæum Life Assurance Co.*, 1 Ir. Jur. N. S. 331). Where in an action for work and labour, the defendant pleaded a special agreement under which the plaintiff was to be paid out of a particular fund only, and not to be paid until certain expenses connected with the works had been discharged, the defendant was ordered to produce any documents relating to the fund out of which the plaintiff's demand was to be paid, and also to any funds which might be applicable to the discharge of the other expenses connected with the works (*Mayers v. Smith*, 6 Ir. Jur. O. S. 480).

Where the defendant claimed a set-off for commission upon sales to persons introduced by him, he was allowed to inspect the plaintiff's books, although the latter swore that there never had been any agreement as to commission (*Bull v. Clarke*, 15 C. B. N. S. 851). Where in an action for libel charging the plaintiff with dishonesty in omitting to pay to defendants monies received by him whilst in their employment, the defendants pleaded a justification, the plaintiff was allowed an inspection of accounts furnished by him to the defendants of monies received by him, of entries of such monies in their books, and of letters written by him to defendants while in their employment so far as such matter related to the acts of dishonesty charged (*Collins v. Feates*, 27 L. J. Ex. 150). Where the defendant who was sued for work done, denied that the work was done, and alleged that if any was done the charge made for it was excessive, and that it was done on the credit of another party, he was allowed to inspect the plaintiff's books containing entries relating to the work (*Hunt v. Hewitt*, 7 Ex. 236; and see *Scott v. Walker*, 2 E. & B. 555, in which case the application was to be allowed to inspect the books of an attorney). Where, however, the question in a cause was as to the plaintiff's solvency, the defendant was refused an order to inspect the plaintiff's books (*Metropolitan Omnibus Co. v. Hawkins*, 4 H. & N. 146); but see *Bartlett v. Lewis*, 12 C. B. N. S. 249. In an action of libel where the libel was alleged to have been contained in certain letters, the defendant was allowed to take photographs of the letters (*Darcy v. Pemberton*, 11 C. B. N. S. 628). In an action against a railway company for injuries to a passenger from an accident imputed to a defective locomotive engine, the Court made an order allowing the plaintiff to inspect reports as to the accident made respectively by the company's engineer, locomotive superintendent, and guard of the train in the ordinary course of their duty, and also of certain other documents in their possession which related to the cause of accident; but refused such order as to reports from scientific men consulted by the company as to the cause of the accident (*Woolley v. North London Railway Co.*, L. R. 4 C. P. 602); and in that case the principles acted on by the Court in granting or refusing inspection of documents such as those mentioned are laid down and explained. It is there stated, that where information and opinion are obtained with a view to litigation, they are to be considered as privileged, but where on the other hand a report is made by an officer of the company to the manager for the purpose of conveying information to him upon the subject to which it relates, and the report is made in the ordinary course of the duty of the agent or servant, whether before or after the commencement of the litigation, it is not privileged and must be produced; and the rule is the same whether it contains matter of fact or mere opinion. In *Baker v. South Western Railway Co.*, L. R. 3 Q. B. 91, an action was brought by executors for negligence resulting in the death of their testator, to which the plea pleaded was accord and satisfaction; and upon an application for the discovery of documents relating to the matter in dispute, it was held that reports of a clerk of the company sent by them to deceased, to communicate with him respecting the accident, and of the medical officer of the company employed by them to visit the deceased respecting his examination of the deceased connected with the accident were not privileged communications. On the other hand in *Cossey v. London, Brighton, &c., Railway Co.*, L. R. 5 C. P. 146, the defendants, in order to ascertain whether or not they should yield to a claim for damages for injuries resulting from an accident, sent their me-

Libel.

Opposite party's books.

Taking photographs.

Confidential reports.

dical officer before litigation commenced or was formally threatened, to report to them upon the nature of the injuries, and it was held that such reports were privileged; and the Court distinguished the case from the one previously referred to, upon the principles laid down in *Woolley v. North London Railway Co.*, *ubi supra*; and see further as to the production of documents in the possession of the opposite party relating to the matters in dispute, and to an inspection of which the party applying would not have been entitled at Common Law on the ground of their being the private documents of the opposite party (*Chartered Bank of India v. Rich*, 4 B. & S. 73; *Woolley v. Pole*, 14 C. B. N. S. 538; *Daniel v. Bond*, 9 C. B. N. S. 716; *Hill v. Great Western Railway Co.*, 10 C. B. N. S. 148); in which latter case, which was an action for wrongful dismissal, the plaintiff was held entitled to have an inspection of all minutes or entries in the company's books having any reference to the plaintiff's employment; and see *Rayner v. Ritson*, 6 B. & S. 888. Communications between attorney and client privileged (*Hopper v. Gumm*, 2 John & H. 602). So are the opinions of counsel (*Jenkins v. Bushby*, L. R. 2 Eq. 547); and the reports of an accountant employed by the party's solicitor (*Walsham v. Stainton*, 2 H. & M. 1). Private and confidential letters from a stranger are not, however, privileged (*Hopkinson v. Burghley*, L. R. 2 Ch. 447). As before mentioned there was no power at Common Law to enforce the production of one part of an agreement which had been originally interchangeably executed. The Court will, however, under the present section enforce production in such a case (*Steehan v. Harnett*, 5 Ir. Jur. O. S. 112).

Privileged
communications.

Public
documents.

An order will not be made for the production of documents of a public nature, and relating to public business, as for instance, reports made in the discharge of the duties of their respective offices by Government officials to the Crown, or its representatives, when such production would be against public policy (*McElveney v. Connellan*, 17 Ir. C. L. R. 55). As to obtaining the production of a police charge, sheet, and summons, see *Smith v. Whelan*, 10 Ir. C. L. R. Ap. 17; and see further, the 73rd G. O. 1854.

How
discovery
obtained.

In order that a party may obtain discovery under the present section he must, as directed above, make an affidavit stating that some one particular document, to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession of the opposite party. The application must be upon notice (*Madden v. Byrne*, 6 Ir. Jur. N. S. 18). The affidavit upon which it is grounded must be made by the party (*Herschfield v. Clark*, 11 Ex. 712). In the case, however, of a corporation aggregate it may be made by the attorney (*Kingsford v. The Great Western Railway Co.*, 16 C. B. N. S. 761). The affidavit must describe the document, and show that it is in the possession of the opposite party (*Evans v. Louis*, L. R. 1 C. P. 656; *Thompson v. Dobson*, 2 H. & N. 412). It will be sufficient for the applicant to pledge his belief as to the existence of the document in question, but the document in question must not be privileged (*Crommelin v. Irish Society*, Ir. R. 2 C. L. 501). The affidavit must also show that the party is entitled to inspection of the document, and the Court will not, therefore, in an action against an attorney for negligence make an order for the production of his books upon a mere suggestion of belief that they contain entries relating to the matters complained of (*Evans v. Louis*, *ubi supra*; and see *Cox v. Brockett*, 18 C. B. N. S. 241). The affidavit should, therefore, show that the document in question is material to substantiate the case of the applicant (see *Riccard v. Inclosure Commissioners*, 4 El. & Bl. 329).

The Court refused to order a defendant to answer on affidavit what documents he had in his possession where he had furnished the plaintiff with the abstract of an account, and informed him that it was taken from a particular book, which contained all the entries relating to the matters in dispute between them (*Bray v. Finch*, 1 H. & N. 468). But interrogatories may, in general, be administered as to whether the party interrogated has in his possession any documents relating to the matters in dispute (*Adams v. Lloyd*, 3 H. & N. 351); but see *Crommelin v. Irish Society*, Ir. R. 2 C. L. 501. A plaintiff obtaining inspection, does so upon an implied understanding, not to make public any information so obtained, or to communicate it to persons strangers to the suit (*Williams v. Prince of Wales Insurance Co.* 23 Beav. 338). As to obtaining an inspection by witnesses, see *Boyd v. Petrie*, L. R. 3 Ch. 818.

The costs of the application are in the discretion of the Court. In general they will be made costs in the cause. The costs of inspection are also in the discretion of the Court (*Stilwell v. Ruck*, 10 Ex. 468; *Smith v. Gl. W. R. Co.*, 6 E. & B. 405).

56. In all causes in any of the superior Courts, by order of the Court or a Judge, the Plaintiff may, with the writ of summons and plaint, and the defendant may, with the appearance and defence, or either of them, by leave of the Court or a Judge, may, at any other time, deliver to the opposite party or his attorney (provided such party, if not a body corporate, would be liable to be called and examined as a witness upon such matter) interrogatories in writing upon any matter as to which discovery may be sought (*w*), and require such party, or in the case of a body corporate any of the officers of such body corporate (*x*), within ten days, to answer the questions in writing by affidavit, to be sworn and filed in the ordinary way; and any party or officer omitting, without just cause, sufficiently to answer all questions (*xx*), as to which a discovery may be sought within the above time, or such extended time as the Court or a Judge shall allow, shall be deemed to have committed a contempt of the Court, and shall be liable to be proceeded against accordingly.

Power to deliver written interrogatories to opposite party. 17 & 18 Vict. c. 125, s. 51.

(*w*) By the above section of the Act the parties to an action are enabled to deliver interrogatories to the opposite party upon any matter as to which discovery may be sought. Formerly the only means by which such discovery could have been obtained was by proceeding in equity.

Interrogatories.

After the introduction of the present Act one of the earliest questions raised was as to the extent of the jurisdiction conferred upon the Court, it having been contended that interrogatories could only be administered in cases where a bill for discovery would formerly have lain: Although, however, the Courts of Common Law, in administering the new jurisdiction conferred by the present section, conform in general to the principles and rules formerly acted upon by the Courts of Equity, it has nevertheless been held that they are not fettered by those rules, and that discovery may be sought

Extent of jurisdiction. Whether same as in equity.

Held to be more extensive.

Cases of personal tort.

General principle as to extent of jurisdiction.

for as to matters upon which the party could not have been interrogated in equity (*Pye v. Butterfield*, 11 Jur. N. S. 220; *Dobson v. Richardson*, 9 B. and S. 516). Thus, although Courts of Equity would not grant discovery in aid of a personal tort, the Courts of law will allow interrogatories in such actions (*Zychlinski v. Maltby*, 10 C. B. N. S. 838); and in that case it was laid down that the Court may allow any interrogatories which are relevant to the matter in issue, and which the party interrogated would be bound to answer if in the witness box. As before mentioned, there are, however, cases to be met with in which it has been held that the jurisdiction of the Court is limited to cases where discovery might have been obtained in equity (see *Edwards v. Wakefield*, 6 El. & Bl. 462).

Must be relevant.

Such, then, being the nature of the jurisdiction possessed by the Courts of Common Law under the present section, the next question to be considered is what are the matters upon which a discovery may be sought, and what are the principles upon which the Courts act in allowing or disallowing interrogatories? This is a question which cannot be considered as finally settled as yet. It may, however, be laid down as a general rule that the administration of interrogatories is not a matter of strict right, and that it rests in the discretion of the Court to allow or to disallow them (*Stern v. Sevastopulo*, 14 C. B. N. S. 737; *Bird v. Maltby*, 1 C. B. N. S. 308), in which latter case the Court refused to allow the interrogatories upon the ground that the party had the means of acquiring the information sought from his own agents. Furthermore, in order that they may be allowed, it may be laid down as a general rule that they must (1) be relevant to the matter in issue (*Robson v. Cooke*, 2 H. & N. 766; *Zychlinski v. Maltby*, 10 C. B. N. S. 838, 843); (2) they must be confined to matters which relate to the case of the party seeking to administer them, and must not extend to matters which relate exclusively to the case of the opposite party; and (3) they must not be of a mere fishing description, i. e. they must have reference to some state of circumstances which the party interrogating has good ground for believing to exist, and must not be put merely for the purpose of finding out if, by chance, whether any circumstances exist of which the party applying may take advantage to support his own case or disprove his adversary's.

Must not exclusively relate to case of opposite party.

As regards the second of the qualifications adverted to above, reference may be had to the case of *Moore v. Roberts*, 26 L. J. C. P. 246, in the judgment in which the law is thus laid down *per* Cockburn, C. J.: "We shall find the object of the act to be this, that when either party to an action has a specific case which he desires to set up, but the materials for making it out are not in his possession, but in that of the other side, he should have a right to interrogate his adversary in order to establish his own case; but he is not entitled to find out how his opponent is going to shape his case, or to see whether there be any defects in it." A defendant will not therefore in an action of trover be allowed to interrogate the plaintiff as to the nature of the title by which he claims the goods (*Finney v. Forwood*, L. R. 1 Ex. 6), with which case compare *Derby Bank v. Lumsden*, L. R. 5 C. P. 107. It has however been held in actions of ejectment that the defendant may interrogate the plaintiff, as to the nature of the title under which he claims (*Flitcroft v. Fletcher*, 11 Ex. 543; *Kettlewell v. Dyson*, 9 B. & S. 300); but these cases have been explained in *Finney v. Forwood*, *ubi supra*; and the plaintiff in ejectment will not be allowed to interrogate the defendant as to the nature of his title (*Horton v. Bott*, 2 H. & N. 249); and see further as to the meaning of the rule that

Ejectment.

the interrogatories must not relate exclusively to the case of the party interrogated (*Edwards v. Wakefield*, 6 El. & Bl. 462; *Peppiatt v. Smith*, 3 H. & C. 129 (an action for negligence); *M'Clintock v. Langan*, 8 Ir. Jur. N. S. 381 (in which case the plaintiff was not allowed to interrogate the defendant as to the particulars of a payment relied upon); *Jourdain v. Palmer*, L. R. 1 Ex. 102; *Zarifi v. Thornton*, 26 L. J. Ex. 214; *Adams v. Lloyd*, 3 H. & N. 351. As regards the third qualification adverted to above, viz., that the interrogatories must not be of a "fishing" nature; reference may be had to *Edwards v. Wakefield*, *ubi supra*, where in an action by the assignees of a bankrupt, an application for leave to interrogate the plaintiffs, as to what acts of bankruptcy they intended to rely upon at the trial was refused on the ground of their being fishing interrogatories; and see further as to the meaning of the rule (*Morris v. Parr*, 6 B. & S. 203; *Jones v. Hargreave*, 29 L. J. Ex. 368; *Atter v. Willison*, 7 W. R. 265).

Fishing
interrogato-
ries.

Where, however, the interrogatories sought to be administered are not open to any of the objections just mentioned, they will in general be allowed; and the rule upon the subject may be taken to be as laid down by Lord Campbell in *Carew v. Davis*, 5 E. & B. 709. "I think the true rule is that such questions may be put as may reasonably be expected to produce answers tending to advance the case of the party who puts them. The rule on this subject has been very clearly laid down by that great jurist, Sir James Wigram, and I concur in that rule in the very terms in which he has laid it down. Whatsoever advances the plaintiff's case may be inquired into, though it may at the same time bring out matter which the defendant relies on for his defence, but you shall not inquire into that which is exclusively matter of defence; that which is common to both the plaintiff and the defendant may be inquired into by either," and accordingly in that case which was an action against an attorney for negligence in the conduct of a defence to an action on a bond, interrogatories were allowed as to whether he had made inquiry concerning the circumstances under which the bond was obtained and the consideration for the same; and in *Whately v. Crowter*, 5 El. & Bl. 709 (which was an action against a surveyor for negligence) similar interrogatories were allowed. As to interrogatories a railway company in an action against them for negligence, see *Bechervaise v. Great Western Railway Co.*, 19 W. R. 229; and see *ante*, p. 325.

When
allowed.

Negligence.

It will not be a fatal objection to the interrogatories that the answers, if given in the affirmative, would render the person interrogated liable to a criminal prosecution, though it may be ground for refusing to answer (*Bartlett v. Lewis*, 12 C. B. N. S. 249; *Bickford v. Darry*, 4 H. & C. 534; *M'Fadden v. The Mayor and Corporation of Liverpool*, L. R. 3 C. P. 279, 281). In such cases the Court has a discretion to say that it will not admit of irrelevant, offensive, or scandalous questions; but it will not allow a question to be shut out because the opposing counsel says that it is a question which the interrogated party may, perchance, object to answer. As instances of cases where the Court, in the exercise of its discretion, has refused to allow such interrogatories to be put, see *Baker v. Lane*, 3 H. & C. 544; *Tupling v. Ward*, 6 H. & N. 749; *Stern v. Sevastopulo*, 14 C. B. N. S. 737; *Edmunds v. Greenwood*, L. R. 4 C. P. 70. In such cases the interrogatories will not be allowed upon the common affidavit, and special circumstances must be shown (*Villeboisnet v. Tobin*, L. R. 4 C. P. 184; *Inman v. Jenkins*, L. R. 5 C. P. 738). As to allowing interrogatories when the answers may have the effect of rendering the party interrogated liable to

Where tend-
ing to crimi-
nate.

- Forfeiture.** a forfeiture, see *Chester v. Wortley*, 17 C. B. 410; *May v. Hawkins*, 11 Ex. 213; *Pye v. Butterfield*, 5 B. & S. 829. Neither is it an objection that the defendant, by answering the interrogatories, will disclose the secrets of his trade (*Howe v. McKernan*, 30 Bear 547); nor is it a ground for refusing to answer that third parties will be thereby exposed to actions (*Tetley v. Easton*, 18 C. B. 643). In *Chester v. Wortley*, 17 C. B. 410, it was laid down that the Court will not, on a motion for leave to deliver interrogatories, entertain the objection that they are such as the party interrogated is privileged from answering, and that such an objection must be taken when the interrogatories are administered, and see *M'Fadden v. Mayor of Liverpool*, L. R. 3 Ex. 279; and as to how far the oath of the party interrogated is conclusive as to the question of privilege, see *Adams v. Lloyd*, 3 H. & N. 351.
- Action against broker.** In an action against a broker interrogatories asking whether he acted as principal or agent, and if as agent who was his principal, were allowed (*Thol v. Leask*, 10 Ex. 704). So also in an action for commission upon the sale of goods, it was held that the defendant was entitled to interrogate the plaintiff as to conversations with the defendant's agents respecting the subject matter of the action (*Rew v. Hutchins*, 10 C. B. N. S. 829). Interrogatories have also been allowed to be administered to an executor who pleaded *plene administravit* (*Peck v. Nolan*, 14 Ir. C. L. R. Ap. 32; and for a form see also *Petheram on Interrogatories*, p. 94); and to defendants sued as assignees of a lease (*Grattan v. Wall*, Ir. R. 2 C. L. 80). So also in an action by surviving partners, interrogatories as to the particulars of a settlement of accounts with a deceased partner have been allowed (*Hawkins v. Carr*, 6 B. & S. 995). A defendant may be interrogated as to whether he has executed a document supposed to have been lost, subject to the condition that the answers were not to be used at the trial unless evidence of the loss was given (*Wolverhampton Waterworks Co. v. Hawkswold*, 5 C. B. N. S. 703; or as to the existence of a partnership between him and a co-defendant (*Bickford v. Darcy*, 4 H. & C. 534); or as to whether he entered into an agreement to become a partner of the plaintiff, and whether the defendant's books contain any entries relating to it (*Levy v. M'Swiney*, 2 Ir. Jur. N. S. 380); or as to whether he has had a correspondence relating to the subjects in dispute, and asking for the dates and names of the places and the correspondence (*Rew v. Hutchins*, *ubi supra*). In an action on a bill of exchange by an indorsee against acceptor, the plaintiff was not allowed to interrogate the defendant as to whether or not on one previous occasion he had authorized his bankers to pay a similar bill, on the ground that no foundation was laid for administering such interrogatories by showing that the answers to them would be material (*Morris v. Bethel*, L. R. 4 C. P. 765); and in a similar action interrogatories as to the consideration given by the plaintiff, and the circumstances attending the indorsement, were refused (*Martin v. Hemming*, 10 Ex. 478).
- Correspondence.**
- Action on bill of exchange.** As to interrogatories in an action of slander, in reference to the speaking of the words, see *Atkinson v. Fosbrooke*, 7 B. & S. 618 (in which case such interrogatories were allowed); *Stern v. Sevastopulo*, 14 C. B. N. S. 727; in an action for libel, *Baker v. Lane*, 3 H. & C. 544; *Tupling v. Ward*, 6 H. & N. 749; *Thompson v. Wynne*, Ir. R. 1 C. L. 600; in an action for negligence, *Peppiatt v. Smith*, 3 H. & C. 129; *Mason v. Wythe*, 5 F. & F. 153; *Whately v. Crowther*, 5 El. & Bl. 709; *Carew v. Davies*, *id.*; and see further, *Woolley v. North London Railway Company* and the other cases referred to, *ante*, p. 325; in an action for a false
- Plene administravit.**
- Assignees of a lease.**
- As to execution of lost instrument.**
- Other instances in which allowed.**

representation, *Blight v. Goodcliffe*, 18 C. B. N. S. 757; where a question of fraud arises, *Goodman v. Hobroyd*, 15 C. B. N. S. 839; *Bayley v. Griffiths*, 31 L. J. Ex. 477; where the object of the interrogatories is to ascertain the amount of damage sustained (*Wright v. Goodlake*, 3 H. & C. 540; *Jourdain v. Palmer*, 4 H. & C. 171; *Dobson v. Richardson*, L. R. 3 Q. B. 778); in an action for libel or malicious prosecution, in support of a plea of privilege or justification, *Stewart v. Smith*, L. R. 2 C. P. 293; or to ascertain whether the defendants' town clerk caused the defendant to be arrested and by what authority he did so (*McFadden v. Mayor, &c., of Liverpool*, L. R. 3 Ex. 279); in an action for assault, &c., to ascertain whether a third person had acted by the defendant's directions, (*O'Connell v. Barry*, 1r. R. 2 C. L. 648); in an action for an infringement of a patent (*Thomas v. Tillie*, 17 Ir. C. L. R. 783); in an action on a policy of assurance (*Zarifi v. Thornton*, 26 L. J. Ex. 214). Where, to a declaration on a policy of life insurance, the defendant pleaded that the proposal, the basis of the policy, declared the life insured had not any symptoms of certain enumerated diseases, or any other complaint, whereas he had symptoms of disease of the stomach, the Court ordered particulars to be delivered of the symptoms alleged (*Marshall v. Emperor Life Assurance Co.*, L. R. 1 Q. B. 35); and see as to the power of the Court to enforce the delivery of particulars, *ante*, pp. 42-44. Particulars of a plea of justification to an action of libel, were ordered to be given in (*Jones v. Bewicke*, L. R. 5 C. P. 32).

Documents.

As regards documents in the possession of the party interrogated, he cannot, under this section, be compelled to state their contents, and in such cases the course to be adopted is to apply for an inspection under sect. 55 (*Scott v. Zygomala*, 4 El. & Bl. 483); *Herschfield v. Clark*, 11 Ex. 712); and see as to interrogatories in reference to the possession of documents by the party interrogated, *Adams v. Lloyd*, 3 H. & N. 351; *Moor v. Roberts*, 2 C. B. N. S. 671; *Rew v. Hutchins*, 10 C. B. N. S. 829; *Levy v. M'Swiney*, 2 Ir. Jur. N. S. 380; *Lambert v. Peyton*, *id.* 459. Interrogatories may, it appears, be allowed as to such possession, provided the documents relate to the case of the interrogating party, but if the party interrogated states that they relate exclusively to his own case, he will not be compelled to give a description of them (*Adams v. Lloyd*, *ubi supra*).

Interpleader.

Interrogatories may be delivered in an interpleader issue (*White v. Watts*, 12 C. B. N. S. 267). As before mentioned, they may also be delivered in an action of ejectment upon the title, the general rule being that the defendant may interrogate the plaintiff, but not *vice versa* (*Flitcroft v. Fletcher*, 11 Ex. 543; *Horton v. Bott*, 2 H. & N. 249). An application on behalf of the defendant for leave to interrogate must, however, be supported by a special affidavit showing that he is ignorant of the nature of the plaintiff's claim (*Stoate v. Rew*, 14 C. B. N. S. 209). In *Chester v. Wortley*, 17 C. B. 410 (an ejectment for breach of condition), the plaintiff was allowed to administer interrogatories to the defendant.

Ejectment.

The Court has jurisdiction to order a plaintiff who is a foreigner and a resident abroad to answer (*Pohl v. Young*, 25 L. J. Q. B. 23). As to the consequence of his not answering, see *Von Hoff v. Hoerster*, 27 L. J. Ex. 299, in which case the Court refused to grant an attachment. As to the practice of the Courts in reference to the administration of interrogatories, see the note to the next section.

Where plaintiff resident abroad.

(2) Interrogatories may be administered to a public officer suing on behalf of a banking company (*M'Kewan v. Rolt*, 4 H. & N. 738). The director of

To officer of corporation.

a company may be interrogated after a compulsory order to wind up has been made (*Madrid Bank v. Bailey*, L. R. 2 Q. B. 37); and interrogatories were allowed against the clerk to commissioners (sued as a nominal defendant) as to acts of negligence charged against them (*Mason v. Wythe*, 3 F. & F. 153).

(xx) Where a party is interrogated as to his knowledge, information, and belief, an answer as to knowledge and information, but not as to belief, is insufficient (*Reynolds v. Bloomfield*, 8 Ir. C. L. R. Ap. 14). A general answer to a particular interrogatory is insufficient (*ib.*).

Affidavits by party proposing to interrogate, and his attorney. 17 & 18 Vict. c. 125, s. 52.

57. The application for such order shall be made upon an affidavit of the party proposing to interrogate, and his attorney or agent, or, in the case of a body corporate, of their attorney or agent, stating that the deponents or deponent believe or believes that the party proposing to interrogate, whether plaintiff or defendant, will derive material benefit in the cause from the discovery which he seeks, that there is a good cause of action or defence upon the merits, and, if the application be made on the part of the defendant, that the discovery is not sought for the purpose of delay (y), provided that where it shall happen, from unavoidable circumstances, that the plaintiff or defendant cannot join in such affidavit, the Court or Judge may allow and order that the interrogatories may be delivered without such affidavit (z).

How leave to interrogate obtained.

When to be administered.

(y) The preceding section provides, that by order of the Court or a Judge the plaintiff may with the summons and plaint, and the defendant may with the defence, or either of them may at any other time deliver interrogatories to the opposite party or his attorney. The plaintiff should, therefore, apply for leave to administer the interrogatories before serving the plaint, but leave may be applied for at any subsequent time, and special circumstances need not necessarily be shown by reason of having delayed the application (*James v. Barnes*, 17 C. B. 596). In *Jones v. Platt*, 6 H. & N. 697 (an action for infringement of a patent), the Court refused to allow the plaintiff to administer interrogatories before declaration, but stated that possibly he might be entitled to do so after issue joined, in which case he would be at liberty to amend his particulars of breaches in accordance with the answers given. Compare with this case *Morris v. Parr*, 6 B. & S. 203; *Croomes v. Morrison*, 5 El. & Bl. 984, in which cases the application was made before declaration. The defendant on the other hand will not be allowed to deliver interrogatories before defence, except under special circumstances, as for instance, where he makes out a case of urgent necessity (*Martin v. Hemming*, 10 Ex. 478). Leave may, however, be granted at that stage of the proceedings under special circumstances (*M'Kenna v. Chester and Holyhead Railway Co.*, 8 Ir. C. L. R. Ap. 26; *Sharpe v. Great S. & W. R. Co.*, id. 27; *White v. Gahagan*, 5 Ir. Jur. N. S. 173. In *M'Mahon v. Ellis*, 7 Ir. Jur. N. S. 321, the application was made after the argument of a demurrer. In *Thompson v. Wynne*, Ir. R. 1 C. L. 600, further interrogatories were allowed to be delivered in addition to a set previously furnished.

As regards the form of the application, when the plaintiff seeks to deliver interrogatories with the summons and plaint, or the defendant with the defence, the application may in general be made *ex parte*, and an absolute order will be made in the first instance (*Lambert v. Peyton*, 2 Ir. Jur. N. S. 459; *Levy v. M'Swiney*, *id.* 380). If the application is made at any other time notice must in general be served (*Peck v. Nolan*, 14 Ir. C. L. R. Ap. 32). In all such cases it must, however, be remembered that the service of notice is a matter for the discretion of the Court, and even when the interrogatories are sought to be administered, with the summons and plaint or defence, the Court may require notice to be served.

The application must in every case be grounded upon affidavit, which must be made by the party and his attorney, except where, for special reasons, the Court dispenses with it, *infra*, note (z). The affidavit must state that the deponents believe that the party proposing to interrogate will derive material benefit from the discovery sought; that there is a good cause of action or defence as the case may be; and where the application is made on behalf of the defendant, that the discovery is not sought for the purposes of delay; and an omission of any of these statements is a fatal objection (*May v. Hawkins*, 11 Ex. 210; *Oxlade v. North Eastern Railway Company*, 12 C. B. N. S. 350), unless the omission be waived (*Whately v. Crawford*, 25 L. J. Q. B. 163). Where there are several defendants, the affidavit, when made by the plaintiff, should aver that he has a good cause of action against all (*Doolin v. Dixon*, 16 W. R. 796).

Where the application is made on the part of the plaintiff to deliver interrogatories, either with the summons and plaint or after it, or by the defendant with the defence or after it, the ordinary form of affidavit, in accordance with the terms of the section, will in ordinary cases be sufficient (*James v. Barnes*, 17 C. B. 596); see, however, *Naghten v. Midland Great Western Railway Company*, 8 Ir. C. L. R. Ap. 55). If, however, the application be made at an earlier period, a special affidavit, stating facts showing the propriety of the proposed interrogatories, will be required (*Croomes v. Morrison*, 5 El. & Bl. 984; *Martin v. Henning*, 10 Ex. 478; *Bechervaise v. Great Western Railway Company*, 19 W. R. 229); and there are other cases where a special affidavit may be required, as, for instance, where a defendant seeks to interrogate a plaintiff as to the nature of his title (*Stoate v. Rew*, 14 C. B. N. S. 209); or where the answers to the proposed interrogatories may criminate the party interrogated (*Villeboisnet v. Tobin*, L. R. 4 C. P. 184). In such cases the affidavit should show the necessity for and propriety of the proposed interrogatories.

Affidavit in support of.

When affidavit must be special.

When the defendant obtains leave to administer interrogatories, the order generally operates as a stay of proceedings until answer. Under special circumstances, however, it may be made part of the order that it shall not so operate (*Zarifi v. Thornton*, 3 Jur. N. S. 92).

Operation of order.

The interrogatories should be carefully framed, and if they appear to the Court or Judge to be carelessly prepared so as in reality to throw upon them or him the trouble of settling them, it may be a ground for refusing to allow them (*Phillips v. Lewin*, 34 L. J. Ex. 37; *Robson v. Crawley*, 2 H. & N. 766, 767).

Settling.

As a general rule the party interrogated must answer all the interrogatories administered and he cannot by a denial of the case of the other party, escape answering any interrogatories which are relevant to the case (*Geary v. Buxton*, 29 L. J. Ex. 280); neither can he escape answering on the ground of

the interrogatories being irrelevant unless it appears upon the face of them that they have been framed for purposes of delay and are not connected with the subject matter of the action (*Reynolds v. Bloomfield*, 8 Ir. C. L. R. Ap. 14). If notice of the motion for leave to administer the interrogatories was not served upon the party interrogated, the proper course to adopt where the interrogatories are objectionable is to apply to have them struck out (*id.*). Where, however, the answer to the interrogatory has a tendency to criminate the party or to expose him to a penalty, he may decline to answer (*Bartlett v. Lewis*, 12 C. B. N. S. 249; *McMahon v. Ellis*, 10 Ir. C. L. R. 120; *The Mary*, L. R. 2 Adm. 319). So also where a party who was interrogated as to whether he had in his possession any deeds or writings relating to the lands in dispute answered that he had, but that the same related exclusively to his own title, it was held that he could not be compelled to state the contents of them or to describe them (*Adams v. Lloyd*, 3 H. & N. 351). In such cases, and also where the party alleges that the answer would have a tendency to criminate him, the oath of the party as to the reasons for not answering is conclusive, unless under the circumstances it appears to the Judge to be perfectly certain that in claiming protection the witness is trifling with the Court (*ib.*).

Where party privileged.

Course to be adopted when party does not answer.

If the party interrogated omit without just cause sufficiently to answer the interrogatories he is guilty of a contempt of Court, and may be proceeded against by attachment. See the last section. As to attaching the party see *Seafield v. Pratt*, 5 L. T. N. S. 674; *Madrid Bank v. Bailey*, L. R. 2 Q. B. 37, in which latter case the official liquidator of the company, though not a party to the action, was allowed to apply for an attachment. The party interrogating may, however, instead of applying for an attachment, apply for an oral examination under the next section (which see); and where the neglect to answer is not contumacious it may be the more advisable course of proceeding (*Turk v. Syme*, 27 L. J. Ex. 54; *Windle v. Lane*, 29 L. J. Ex. 245).

As to using the depositions of the party interrogated, see sect. 60, *post*, and as to the costs of the proceedings see sect. 62.

(x) Where the plaintiff was, and always had been, residing in England, and was of very advanced years, the Court, nevertheless, refused to dispense with his joining in the affidavit (*Adair v. Simpson*, Ir. R. 1 C. L. 577).

Oral examination of parties when to be allowed 17 & 18 Vict. c. 123, s. 53.

58. In case of omission, without just cause, to answer sufficiently such written interrogatories, the Court or a Judge may direct an oral examination of the interrogated party, as to such points as shall appear fit, before a Judge or the master; and the Court or Judge may by such rule or order, or any subsequent rule or order, command the attendance of such party or parties before the person appointed to take such examination, for the purpose of being orally examined as aforesaid, or the production of any writings or other documents to be mentioned in such rule or order, and may impose therein such terms as to such examination, and the costs of the application, and of the proceedings thereon, and otherwise, as to such Court or Judge shall seem just (a).

(a) The jurisdiction of the Court under this section will be exercised with caution (*Swift v. Nun*, 26 L. J. Ex. 365); and an application under it must be promptly made (*Chester v. Wortley*, 18 C. B. 239). Where a party has substantially answered the interrogatories, but there are defects or flaws in any of them, which render them formally insufficient, the proper course is to apply to have them amended, and an order for an oral examination will be refused (*Bender v. Zimmerman*, 29 L. J. Ex. 244). The application should be upon notice. As to what it should be grounded upon, see *Swift v. Nun*, *ubi supra*.

Oral examination.

59. Such rule or order shall have the same force and effect, and may be proceeded upon in like manner, as an order made under the said herein-before mentioned Act of the third and fourth *Victoria*, chapter one hundred and five (b).

Proceedings upon such rule or order. 17 & 18 Vic. c. 125, s. 64.

(b) See the Act *post*, in the Appendix, sects. 69-75.

60. Whenever, by virtue of this Act, an examination of any witness or witnesses has been taken before a Judge of one of the said superior Courts, or before the master, the depositions shall be returned to and kept in the master's office of the Court in which the proceedings are pending; and office copies of such depositions may be given out, and the depositions may be otherwise used, in the same manner as in the case of depositions taken under the herein-before mentioned Act of the third and fourth *Victoria*, chapter one hundred and five (c).

Depositions upon such examinations to be returned to Master's office. 17 & 18 Vic. c. 125, s. 55.

(c) See the Act *post*, in the Appendix, sect. 75.

An office copy of the answer to the interrogatories will as against the party making it be sufficient evidence of the answer at the trial; and the interrogatories need not be produced. Where the answer has not been in the same cause, an examined copy will be sufficient evidence (*Fleet v. Perrins*, L. R. 3, Q. B. 536). As to contradicting the party answering by his answers, see sect. 27, *ante*, and see also *Carwell v. Gees*, 15 L. T. N. S. 217, where it was held at Nisi Prius *per* Blackburn, J., that the answers could not be used for the purpose of contradicting the person to whom they were administered on his examination in Court, on the ground that such a proceeding would be an inquiry into the client's instructions to his attorney, which are privileged communications. *Sed quæ*.

Depositions What evidence of.

Where not in the same cause.

61. It shall be lawful for every Judge or master named in any such rule or order as aforesaid for taking examinations under this Act, and he is hereby required, to make, if need be, a special report to the Court in which such proceedings are pending touching such examination, and the conduct or absence of any witness or other person thereon or relating thereto; and the Court is hereby authorized to institute such proceedings and make such order and orders upon such

Examiner may make special report to the Court. 17 & 18 Vic. c. 125, s. 53.

report as justice may require, and as may be instituted and made in any case of contempt of the Court.

Costs of rule and examination to be at the discretion of the Court. 17 & 18 Vict. c. 25, s. 57.

62. The costs of every application for any rule or order to be made for the examination of witnesses by virtue of this Act, and of the rule or order and proceedings thereon, shall be in the discretion of the Court or Judge by whom such rule or order is made (d).

Costs.

(d) From the wording of the above section it appears to be doubtful whether its provisions apply to the costs of the examination of the parties themselves upon interrogatories.

It would appear, however, that such costs are in the discretion of the Court, see *Stilwell v. Ruck*, 4 H. & N. 468. If the order allowing interrogatories is silent as to costs, the costs will not be allowed, as costs in the cause for the interrogating party, even although he is successful (*Smith v. Great W. R. Co.*, 6 E. & B. 405); the principle being that interrogatories are interlocutory proceedings, and the costs incurred in reference to them will not be costs between party and party unless so ordered by a Judge (*Elatob v. Honeywill*, 20 L. T. N. S. 227).

Judge may order an attachment of debts. 17 & 18 Vict. c. 125, s. 1.

63. It shall be lawful for a Judge, upon the *ex-parte* application of a judgment creditor (e), and upon affidavit by himself or his attorney stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, to order (f) that all debts (g) owing or accruing from such third person (herein-after called the garnishee) to the judgment debtor shall be attached to answer the judgment debt; and by the same or any subsequent order it may be ordered that the garnishees shall appear before the Judge or master, as such Judge shall appoint, to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt.

Attaching debt.

Foreign attachment:

(e) Under the provisions of this and the following sections a judgment creditor is enabled to attach a debt due to his debtor, and to realize the amount of his judgment thereout. Previous to the Act there was no process issuing out of the superior Courts by which this could be effected, although in cases within the jurisdiction of the Lord Mayor and Sheriff's Court of Dublin, a debt could be attached by a foreign attachment issuing thereout. In such cases the debt was attached in the first instance and before judgment, but under the above section a creditor must first recover judgment before he can attach a debt by the means provided.

Reviving judgment.

An attachment under the Act is an execution, and, therefore, the creditor must be in a position to issue execution, and the judgment must be first revived in case of lapse of time or change of parties before a garnishee order

can be obtained (*Baynard v. Simmons*, 24 L. J. Q. B. 253; *Nolan v. Hornidge*, 1r. R. 3 C. L. 48). So, also, while the debtor is detained under a *ca. sa.* the creditor cannot obtain a garnishee order (*Jauralde v. Parker*, 30 L. J. Ex. 237); but see *ante*, p. 147, as to how far an arrest under a *ca. sa.* operates in Ireland as a satisfaction of the debt.

Again if the judgment has been recovered in a penal sum upon which it would be necessary to assign breaches before issuing execution, the plaintiff, inasmuch as he is not in a position to issue execution, cannot obtain a garnishee order (*Ryan v. Reynolds*, 7 Ir. Jur. N. S. 82; and see *Jones v. Jenner*, 25 L. J. Ex. 319).

Assigning breaches.

In order to obtain a garnishee order an application must be made *ex parte* to a Judge in the first instance on an affidavit to be made by the creditor or his attorney, setting out to what extent the judgment is unsatisfied, and that some third person is indebted to the judgment debtor, and is within the jurisdiction. In order to get the costs of the application the affidavit should further show that it would be impracticable or difficult to realize the judgment otherwise; see *post*, s. 69. It is also the duty of the creditor to state in his affidavit any special circumstances affecting his own debt or the debt sought to be attached (*Collins v. Thompson*, 13 Ir. C. L. R. Ap. 51; *Ryan v. Reynolds*, *ubi supra*). If a proper case be made the Judge will make an order attaching the debt and ordering the garnishee to appear and show cause why he should not pay to the judgment creditor the amount of the debt attached or so much of it as will be sufficient to satisfy the judgment debt. As to the proceedings to be taken to obtain payment, see s. 65, and as to the costs of the proceedings, see sect. 69. As to the nature of the debt which the Court has jurisdiction to attach, and the effect of the order attaching it, see note (g), *infra*.

Procedure.

The application must in the first instance be made to a Judge and not to the Court (*Dunbar v. Russell*, 2 Ir. Jur. N. S. 234). When, however, the judgment creditor subsequently proceeds to obtain an absolute order to pay, or in default for leave to issue execution, the application may be made either to the Court or to a Judge in chamber (*Murphy v. Bennett*, 7 Ir. C. L. R. 9).

To whom application to be made.

A party to an interpleader issue who obtains an order for payment of costs is a judgment creditor within the meaning of the garnishee clauses of the statute (*Hartley v. Shemwell*, 30 L. J. Q. B. 223). A garnishee order can, however, be obtained only by a judgment creditor at Common Law (*Commissioners of Charitable Donations v. Archbold*, 14 Ir. C. L. R. 67; *In re Price*, L. R. 4 C. P. 155).

By whom a garnishee order may be obtained.

Money in the hands of a receiver cannot be attached without the leave of the Court of Chancery (*Winton v. Brecon*, 28 Beav. 200; and see *ex parte Turner*, 2 D. F. & J. 354; *Williams v. Reeves*, 12 Ir. Ch. R. 173.) When a judgment is recovered against an executor, as such, a debt due to the estate of the testator may be attached (*Burton v. Roberts*, 6 H. & N. 93; *Morton v. Mahon*, 6 Ir. C. L. R. 131, and see *Fowler v. Roberts*, 2 Gif. 226; *In re Barnes*, 36 L. J. Ch. 63; *Chapman v. Collis*, 6 L. T. N. S. 282). Where there are several joint judgment debtors a debt due to one may be attached (*Miller v. Myan*, 28 L. J. Q. B. 324). As to attaching a debt due by one defendant to the other see *Chapman v. Collis*, *ubi supra*.

Judgment against executor.

Joint debtors.

(f) The order to attach is absolute in the first instance, the order to pay conditional (*McCann v. Bowers*, 2 Ir. Jur. N. S. 379). Where the debts are

Form of order.

Attaching several debts. small several may be included in the same order though due by different persons (*Doherty v. M'Daid*, 16 Ir. C. L. R. Ap. 22; *Guinness v. Hill*, 8 Ir. Jur. N. S. 95).

What debts may be attached. (g) As to the nature of the debt which may be attached, it may be laid down as a general principle that wherever the judgment debtor can maintain an action of debt in a court of law to recover the demand it may be attached under the present section, otherwise not. Thus, a legacy cannot be attached unless an account has been stated in reference to it (*M'Dowell v. Hollister*, 25 L. T. 185). As, however, the statute speaks of debts "accruing," a debt not payable till a future day may be attached (*Sparkis v. Young*, 8 Ir. C. L. R. 251; *Payne v. French*, 10 Ir. Jur. N. S. 52); but then it must be a *debitum in presenti, solvendum in futuro*.

To refer to the numerous cases illustrating what debts may and what may not be attached under the above section would not be possible in a work such as the present. A few only will therefore be referred to. A debt, the amount of which has not been ascertained, but which is liquidated in its nature, may be attached (*Daniel v. M'Carthy*, 7 Ir. C. L. R. 261); so also may a judgment entered up as security for the payment of a sum certain (*Sparks v. Young*, 8 Ir. C. L. R. 251); so, also, may the money due on a deposit receipt, but an order to pay will not be made until the requisite notice is given (*Payne v. French*, 10 Ir. Jur. N. S. 52); so also a debt, the amount of which is liable to variation before the day of payment (*Russell v. Ferguson*, 1r. R. 2 C. L. 78). Rent may be attached (*Leake v. Noble*, 6 Ir. C. L. R. 510); but the tenant will not be ordered to pay before the usual time (*Guinness v. Hill*, 8 Ir. Jur. N. S. 95); and if the landlord, after the commencement of the tenancy, has mortgaged the property, the order will be discharged at the instance of the mortgagee (*Collins v. Thompson*, 13 Ir. C. L. R. Ap. 51, and see *Conran v. Peddar*, 2 Ir. C. L. R. 200). Although, however, a mortgage has been given, yet if the rents, &c., be received by an agent of the mortgagor, or other person liable to him, they may be attached in the hands of such person (*Sweeney v. Enniskillen, &c., Railway Company*, 1r. R. 2 C. L. 338). The amount of an execution at the suit of the judgment debtor may be attached in the hands of the sheriff (*Murray v. Simpson*, 8 Ir. C. L. R. Ap. 45), with which case compare *Williams v. Reeves*, 12 Ir. Ch. Rep. 173); so also the proceeds of the sale of a commission in the hands of an army agent (*Power v. Kenny*, 5 Ir. Jur. N. S. 91). As to attaching a pension, see *Innes v. East India Company*, 17 C. B. 351; *Wynne v. Hamerton*, 3 Law Rec. O. S. 1). In *Burke v. Lechmere*, 19 W. R. 565, a call due by a shareholder was attached.

Amount of an execution. Pension. Call. On the other hand, a garnishee order will not be made where the debtor could not have sued for the debt in a court of law, as in the case of a dividend coming to the debtor out of an estate in the Court of Bankruptcy (*Boyse v. Simpson*, 8 Ir. C. L. R. 523); or a dividend in a winding-up matter (*Dawson v. Malley*, 1r. R. 1 C. L. 207); or money paid into Court in an action brought by the judgment debtor against the garnishee (*Jones v. Brown*, 29 L. T. 79); or the amount of a presentment in the hands of the treasurer of a county (*Geraghty v. Sharkey*, 2 Ir. Jur. N. S. 424). Neither can a debt due under a bond given to the wife of the debtor *dum sola* be attached (*Dingley v. Robinson*, 26 L. J. Ex. 55). So, also, even in cases where the debtor might have sued for the demand at law, yet if the demand is not a *debt* it cannot be attached. Thus, a bond given to the debtor to indemnify him against the costs of an action brought by him cannot be attached (*Johnson v. Diamond*, 24 L. J. Ex. 217); neither can a verdict for unliquidated damages (*Shaw v.*

What cannot be attached.

Bond of indemnity. Verdict.

Shaw, 18 L. T. N. S. 420; *Jones v. Thompson*, E. B. & E. 63; *Dresser v. Jones*, 6 C. B. N. S. 429). Again, even although the debtor might have maintained an action of debt, yet the debt cannot be attached in cases where the debtor is not beneficially interested (*Westoby v. Day*, 2 E. & B. 605); or where the sum in question is subject to a trust; as, for instance, where it is sought to attach a debt due to a corporation which is bound by statute to apply its property rateably in the payment of its debts (*Kennett v. Westminster Improvement Commissioners*, 25 L. J. Ex. 97; and see *Ames v. Birkenhead Trustees*, 20 Beav. 332).

Where debtor a trustee.

64. Service of an order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee, in such manner as the Judge shall direct, shall bind such debts in his hands (*h*).

Order for attachment to bind debts. 17 & 18 Vict. c. 125, s. 62.

(*h*) After the service of the attachment order the garnishee cannot pay the debt to the judgment debtor except at his peril. The execution creditor acquires, however, no greater interest in the debt attached than what the judgment debtor possessed, and therefore the garnishee may set off against the debt attached, any debt which he might set off against the debtor, or enforce against it any lien which he might enforce against the judgment debtor (*Nathan v. Giles*, 5 Taunt. 558). So also if the debtor has assigned the debt, the garnishee order will have no operation upon it (*Hirsch v. Coates*, 18 C. B. 757); and see also *Kennet v. Westminster Improvement Commissioners*, *ubi supra*. As to the general lien of an attorney upon the debt attached, see *The Jeff Davis*, 17 L. T. N. S. 151; *Hough v. Edwards*, 1 H. & N. 171; *Eisdell v. Coningham*, 28 L. J. Ex. 213; *Sympson v. Prothero*, 3 Jur. N. S. 711).

Effect of order.

Where debt assigned.

Again, if the execution creditor becomes bankrupt or insolvent after the making of the order to attach, and before the making of the order to pay, the assignees in bankruptcy become entitled to the debt (*Holmes v. Tutton*, 5 E. & B. 65; *Tilbury v. Brown*, 6 Jur. N. S. 1151); and see *Wood v. Dunn*, L. R. 1 Q.B. 77, S. C. on appeal L. R. 2 Q. B. 73; *European Bank v. Fox*, 15 W. R. 158. In such cases the creditor loses the benefit of the garnishee order by force of sec. 329, of 20 & 21 Vic. ch. 60. But if the money is paid into Court before bankruptcy, the result will be different (*Culverhouse v. Wickens*, L. R. 3 C. P. 295).

Where debtor becomes bankrupt.

65. If the garnishee does not forthwith pay into Court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear upon summons, then the Court or a Judge may order execution to issue, and it may be sued forth accordingly, without any previous writ or process, to levy the amount due from such garnishee towards satisfaction of the judgment debt (*i*).

Proceedings to levy amount due from garnishee to judgment debtor. 17 & 18 Vict. c. 125, s. 63.

(*i*) Before the order to pay is made absolute, the garnishee, if he has cause to show, should show cause in the manner provided by the 134th and 135th

Showing cause.

G. Oa. 1854. He cannot appear by attorney upon showing cause (*Delahunt v. Bennett*, 7 Ir. C. L. R. 8). If he files an affidavit for the purpose of showing cause the execution creditor should serve notice of motion to make the rule absolute (see the 134th G. O. 1854); and even although no such affidavit is filed the execution creditor must nevertheless appear upon the day fixed by the first order for the appearance of the garnishee for the purpose of making the order absolute. In cases where no cause is shown the Court may, if the circumstances of the case render it fit, extend the time for payment by the garnishee (*Guinness v. Hill*, 8 Ir. Jur. N. S. 95).

Judge may
a low judg-
ment cre-
ditor to sue
garnishee.
17 & 18 Vict.
c. 128, s. 64.

66. If the garnishee disputes his liability, the Court or a Judge, instead of making an order that execution shall issue, may order that the judgment creditor shall be at liberty to proceed against the garnishee by writ, calling upon him to show cause why there should not be execution against him for the alleged debt, or for the amount due to the judgment debtor, if less than the judgment debt, and for costs of suit; and the proceedings upon such suit shall be the same, as nearly as may be, as upon a writ of revivor issued under "The Common Law Procedure Act Amendment Act, Ireland, 1856 (j).

Suing
garnishee.

(j) If the garnishee disputes his liability, or has cause to show, he should file an affidavit where necessary, or else serve notice of showing cause, as above stated. Even though he disputes his liability, the Court will make the order to pay absolute if the dispute does not appear to be substantial or *bonâ fide* (*Newman v. Rook*, 4 C. B. N. S. 434). Where a garnishee has served notice of showing cause he is entitled to begin even although the plaintiff has subsequently served notice to make absolute (*Gilmour v. Simpson*, 8 Ir. C. L. R. Ap. 38).

If there be other parties interested besides the garnishee the creditor should state the circumstances, showing how they are interested, upon his first application, and the Judge will then direct them to be served (*Collins v. Thompson*, 13 Ir. C. L. R. Ap. 51). In such cases, if the garnishee does not dispute his liability, the Court will order the garnishee to bring the money into court (*Robinson v. Bloomfield*, 2 Ir. Jur. N. S. 379); and will, if necessary, direct an action or issue to be tried between the claimants; and see *Goodfellow v. Hunter*, 9 Ir. Jur. N. S. 48, in which case the judgment creditor was allowed, upon the trial of the action directed to be brought, to set up a case different from that made by him in the first instance.

The Court may also, in its discretion, refuse to make an order to pay, or to allow a writ to be issued (*Wise v. Birkenshaw*, 29 L. J. Ex. 240; *Jones v. Jenner*, 25 L. J. Ex. 319; *Richardson v. Greaves*, 10 W. R. 45); in which latter case an action had been brought by the debtor against the garnishee, and was pending, and the Court refused to allow a writ to issue, but permitted the order attaching the debt to stand. As a general rule, however, when the Court does not think fit to make an order to pay, it will allow a writ to be issued (*Seymour v. Corporation of Brecon*, 29 L. J. Ex. 243).

The writ issued under this section will be entitled as in the original cause. For forms of the writ, defence, and other proceedings, see the English Forms of Proceeding of Michaelmas Vacation, 1854, Nos. 24-31; also *Johnson v. Diamond*, 11 Ex. 73. The garnishee may in general plead the same defences as in an action brought against him by the execution debtor. He cannot, however, plead that he is detained under a *ca. sa.* at the suit of the execution debtor (*Hartley v. Shemwell*, 30 L. J. Q. B. 223; *Marples v. Hartley*, 1 B. & S. 1). In *Jauralde v. Parker*, 6 H. & N. 431, a plea that the plaintiff had taken the execution debtor in execution under a *ca. sa.* was held to be good; with which case compare *Halahan v. Worman*, 11 W. R. 10, and see *ante*, p. 147.

How writ entitled.

The garnishee cannot be held to bail (*Hörner v. Loff*, 3 B. & S. 818). As to the necessity of the garnishee making what case he can against the order for payment, see the note to the next section. As to whether the trial of an issue under this section can be had in the Consolidated Nisi Prius Court, see *Waldron v. Parrott*, 8 Ir. C. L. R. Ap. 50; and as to the costs see *sec. 69*.

Forms of proceedings.

67. Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid shall be a valid discharge to him as against the judgment debtor to the amount paid or levied, although such proceeding may be set aside or the judgment reversed (*k*).

Discharge of garnishee.
17 & 18 Vict.
c. 125, s. 65.

(*k*) The garnishee, as provided above, is discharged by payment of the debt, or by an execution levied, and he may plead such defence *puis darrien continuance*, in case the execution debtor has previously brought an action against him for the same demand (*Webb v. Hurrell*, 4 C. B. 287). For a form of such defence see Bullen and Leake's Pr. Pl., 2nd ed., p. 428. Payment under a garnishee order of a foreign court of competent jurisdiction will also be a discharge (*Gould v. Webb*, 4 E. & B. 933). The garnishee is not discharged by a payment made before the making of the Judge's order to pay (*Turner v. Jones*, 26 L. J. Ex. 262; *Wood v. Dunn*, L. R. 1 Q. B. 77, S. C. in Ex. Ch. L. R. 2 Q. B. 73); nor if he pays without being served (*Lockwood v. Nash*, 18 C. B. 56); but see *Cooper v. Brayne*, 27 L. J. Ex. 446; nor if he pays before the time fixed by the order. And in such cases the assignees in bankruptcy could compel him to pay over again. He should also show what cause he can against the order to pay, and if he fails to do so, *sembl.* the payment is not a discharge (see *Salaman v. Donovan*, 10 Ir. C. L. R. Ap. 13). In such cases it must appear either that at the time of the making of the payment the garnishee had no notice of the bankruptcy, &c., or, if the payment was made with notice, that it was made under such circumstances that he was unable to get the order set aside before he was compelled to pay to save execution being actually levied (*Wood v. Dunn*, *ubi supra*).

How far garnishee discharged.

As to making a judgment creditor refund, see *De Winton v. Brecon*, 6 Jur. N. S. 1046; *Wood v. Dunn*, *ubi supra*.

Refunding.

Attachment book to be kept by the masters of each Court. 17 & 18 Vict. c. 120, s. 66.

68. In each of the superior Courts there shall be kept at the master's office a debt attachment book, and in such book entries shall be made of the attachment and proceedings thereon, with names, dates, and statements of the amount recovered, and otherwise; and the mode of keeping such books shall be the same in all the Courts, and copies of any entries made therein may be taken by any person, upon application to the master.

As to costs of application for attachment, &c. 17 & 18 Vict. c. 120, s. 67.

69. The costs of any application for an attachment of debt under this Act, and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court or a Judge (l).

Costs.

(l) The costs under the above section are in the discretion of the Court, and in order that the plaintiff may get them he should, in general, show that it would have been difficult or impracticable to realize his judgment otherwise. In such cases where the garnishee does not show cause the plaintiff will be allowed the costs as against the defendant (*Dockrill v. Boylan*, 2 Ir. Jur. N. S. 368, 380.) In cases where a writ is issued under the 66th section the garnishee is in the same position as an ordinary defendant as to costs (*Johnson v. Diamond*, 11 Ex. 431); and the provisions of the 243rd section of the C. L. P. Act, 1853, and of the 97th sect. of the present Act, will apply. Even in such cases, however, the costs are in the discretion of the Court, if the order giving liberty to issue the writ reserve the question (*Waldron v. Parrott*, 9 Ir. C. L. R. 175). Where the execution creditor, after bringing the garnishee before the Court declines to proceed further, the Court may, on discharging the order, give the garnishee his costs as against the creditor (*Wintle v. Williams*, 27 L. J. Ex. 311).

Action for mandamus to enforce the performance of duties. 17 & 18 Vict. c. 120, s. 68.

70. The plaintiff in any action in any of the superior Courts, except replevin and ejectment, may claim in the writ of summons and plaint, either together with any other demand which may now be enforced in such action or separately, a writ of mandamus commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested (m).

Limits of jurisdiction.

Prerogative writ of mandamus.

(m) The limits of the new jurisdiction created by this section have not been as yet precisely determined, and it is difficult—having regard to the cases—to state with certainty in what cases a plaintiff may obtain a writ of mandamus under this section. The prerogative writ of mandamus was granted only in cases where some public or official duty was omitted to be performed. It was not applicable as a private remedy to enforce simple common law rights between individuals, such as to compel payment of money due on a bond, or the restitution of chattels, still less to command a party to abstain from a tort or from the abuse of his office (*Tapping on Mandamus*, p. 11). Thus, the Court could not grant a mandamus to compel the Bank of England

to produce their accounts for the purpose of declaring a dividend of the profits (*Rez v. Bank of England*, 2 B. & Ald. 620). Moreover in cases where the writ was issuable the party affected could not issue the writ without the leave of the Court, and the proceedings afterwards were uncertain, tedious, and expensive. To remedy these inconveniences, and to afford a party affected a direct means of enforcing the performance of a duty, the above section and the following ones were passed.

Inasmuch as a "duty" arises whenever an obligation exists, it would follow, on the literal construction of the words of the Act, that a writ of mandamus may be prayed for in every action whether of contract or tort; in other words, that Courts of Law could in every case enforce the specific performance of contracts or other legal obligations. It was, however, soon decided that such was not the construction of the Act, and in *Benson v. Paul*, 6 E. & B. 273, the Court held, upon demurrer to a declaration in mandamus, that it could not by virtue of the Act enforce specific performance of an agreement for a lease. In fact, the Court possesses no machinery for the purpose of working out such a judgment. In *Benson v. Paul*, the Court indeed went further, and intimated that the action only lay in cases where a prerogative writ of mandamus might have been issued. It has, however, been since decided that the remedy is not restricted to such cases, and it has accordingly been held that an action of mandamus lies against a company to compel them to register the plaintiff as a shareholder (*Norris v. Irish Land Company*, 8 E. & B. 512; *Swan v. North British Australasian Company*, 7 H. & N. 603); or to apply their funds in payment of the interest upon a bond issued by them pursuant to statute (*Webb v. Herne Bay Commissioners*, L. R. 5 Q. B. 642); and the result of the authorities, as they now stand, would appear to be that while the "duty" spoken of in the section should be one either of a public or quasi public nature, i. e. one not arising merely from the private agreement of the parties, it is not at the same time necessary that the public should have the same interest in the performance of it, as in cases where the prerogative writ is applied for. Thus, an action of mandamus lies against a railway company to compel them to issue a warrant to the sheriff to summon a jury to assess the value of the plaintiff's land taken for the purposes of the railway (*Fotherby v. Metropolitan Railway Co.*, L. R. 2 C. P. 138). So, also, an action for a mandamus lies to compel Improvement Commissioners to strike a rate for the purpose of paying the plaintiff for work done for them (*Ward v. Lowndes*, 1 E. & E. 940); and the value of the work may be assessed in the same action. In general, where the plaintiff has an adequate remedy without issuing a mandamus, the action does not lie (*Bush v. Beavan*, 1 H. & C. 500).

Cannot enforce specific performance.
More extensive than in case of prerogative writ.

71. The writ of summons and plaint in such action shall set forth sufficient grounds upon which such claim is founded, and shall set forth that the plaintiff is personally interested therein, and that he sustains or may sustain damage by the nonperformance of such duty, and that performance thereof has been demanded by him, and refused or neglected (n).

Declaration in action for mandamus. 17 & 18 Vict. c. 125, s. 69.

(n) In order to obtain a writ of mandamus, the summons and plaint should pray for it specifically, and, in addition, the above section points out

Form of summons and plaint.

four other requisites which must be complied with—that is to say—(1) the plaint should show sufficient grounds to sustain the claim; (2) it should show the personal interest of the plaintiff; (3) the damage arising from nonperformance, and (4) a demand for and refusal of performance. Where the mandamus is claimed on foot of a money demand, the precise amount need not be ascertained (*Ward v. Lowndes*, 1 E. & E. 940); and for forms of declarations in an action of mandamus, see Builen and Leake's Pr. Pl., 2nd ed., p. 309.

Proceedings upon claim for mandamus. 17 & 18 Vict. c. 125, s. 70.

72. The pleadings and other proceedings in any action in which a writ of mandamus is claimed shall be the same in all respects, as nearly as may be, and costs shall be recoverable by either party, as in an ordinary personal action (o).

Defences.

(o) The Statutes of Limitations do not apply so as to limit the time within which the writ may be prayed for (*Ward v. Lowndes*, 1 E. & E. 940); but where the demand, in respect of which it is sought, is barred by the statute, it is a good answer to the action (*Bush v. Beavan*, 1 H. & C. 500). As to pleading to the claim for the writ, as distinguished from the demand in respect of which it is sought, see p. 348, note (u).

Error.

Error may, of course, be brought upon the judgment in an action of mandamus (*Morgan v. Metropolitan Railway Co.*, L. R. 4 C. P. 97).

Setting aside.

Where the action was brought against an officer of the Court, the Court, under the circumstances, set the writ aside (*Rea v. Nagle*, 9 Ir. Jur. N. S. 81).

As to the costs, the above section provides, as will be observed, that they are to be recoverable as in an ordinary personal action; and see the 23 & 24 Vict. ch. 126, sect. 32, which, however, does not apply to Ireland.

For a form of the judgment, see the English Forms of Proceedings, Mich. Vac. 1854, No. 32; and for a form of the writ and other forms connected with the action, see Chitty's Forms, 10th ed., p. 643 *et seq.*

Judgment and execution. 17 & 18 Vict. c. 125, s. 71.

73. In case judgment shall be given for the plaintiff that a mandamus do issue, it shall be lawful for the Court in which such judgment is given, if it shall see fit, besides issuing execution in the ordinary way for the costs and damages, also to issue a peremptory writ of mandamus to the defendant, commanding him forthwith to perform the duty to be enforced (p).

Issuing writ.

(p) It follows that in all cases an application must be made after judgment to issue the writ, and that it lies in the discretion of the Court to grant or refuse the application (see *Nicholl v. Allen*, 1 B. & S. 916, 934; and see *post*, sect. 84, note (y)).

Form of peremptory writ. 17 & 18 Vict. c. 125, s. 72.

74. The writ need not recite the writ of summons and plaint, or other proceedings, or the matter therein stated, but shall simply command the performance of the duty, and in

other respects shall be in the form of an ordinary writ of execution, except that it shall be directed to the party and not to the sheriff, and may be issued in term or vacation, and returnable forthwith; and no return thereto, except that of compliance, shall be allowed, but time to return it may, upon sufficient grounds, be allowed by the Court or a Judge either with or without terms (q).

(q) It may be questionable whether the costs of preparing and issuing the writ are recoverable (see 23 & 24 Vict. ch. 126, sect. 32, which does not apply to Ireland; and see also *Jessel v. Chapman*, 2 Jur. N. S. 931). Costs.

75. The writ of mandamus so issued as aforesaid shall have the same force and effect as a peremptory writ of mandamus issued out of the Court of Queen's Bench, and in case of disobedience may be enforced by attachment. Effect of writ of mandamus and proceedings to enforce it. 17 & 18 Vict. c. 125, s. 73.

76. The Court or a Judge may, upon application by the plaintiff, besides or instead of proceeding against the disobedient party by attachment, direct that the act required to be done may be done by the plaintiff, or some other person appointed by the Court, at the expense of the defendant; and upon the act being done the amount of such expense may be ascertained by the Court, either by writ of inquiry or reference to the master, as the Court or a Judge may order; and the Court may order payment of the amount of such expenses and costs, and enforce payment thereof by execution (r). The Court may order the act required to be done to be done at the expense of the defendant. 17 & 18 Vict. c. 125, s. 74.

(r) For a form of the writ of inquiry, see the English Forms of Proceedings, Mich. Vac. 1854, No. 33.

77. Nothing herein contained shall take away the jurisdiction of the Court of Queen's Bench to grant writs of mandamus; nor shall any writ of mandamus issued out of that Court be invalid by reason of the right of the prosecutor to proceed by action for mandamus under this Act(s). Prerogative writ of mandamus preserved. 17 & 18 Vict. c. 125, s. 75.

(s) As to the nature, &c., of the prerogative writ of mandamus, see *Tapping on Mandamus*; and see, also, 9 & 10 Vict. ch. 13 (*post*, in the Appendix), which regulates the proceedings on writs of mandamus in Ireland. Prerogative writ.

78. Upon application by motion for any writ of mandamus in the Court of Queen's Bench, the rule may in all cases be

Proceedings
for prerogative writ of
mandamus
accelerated.
17 & 18 Vict.
c. 125, s. 76.

absolute in the first instance, if the Court shall think fit; and the writ may bear teste on the day of its issuing, and may be made returnable forthwith, whether in term or in vacation, but time may be allowed to return it, by the Court or a Judge, either with or without terms.

Proceedings
on prerogative writ of
mandamus.
17 & 18 Vict.
c. 125, s. 77.

79. The provisions of "The Common Law Procedure Amendment Act (*Ireland*), 1853" and of this Act, so far as they are applicable, shall apply to the pleadings and proceedings upon a prerogative writ of mandamus issued by the Court of Queen's Bench, but subject to any general rules which the said Court may make, and which it is hereby empowered to make in relation thereto.

Specific delivery of
chattels.
17 & 18 Vict.
c. 125, s. 78.

80. The Court or a Judge shall have power, if they or he see fit so to do, upon the application of the plaintiff in any action for the detention of any chattel, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed, and that if the said chattel cannot be found, and unless the Court or a Judge should otherwise order, the Sheriff shall distrain the defendant by all his lands and chattels in the said Sheriff's bailiwick till the defendant render such chattel, or, at the option of the plaintiff, that he cause to be made of the defendant's goods the assessed value of such chattel; provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages, costs, and interest in such action (t).

(t) Previous to the Act, in actions of detinue the judgment was for the return of the chattel or its value, and the damages and costs. The consequence was that the defendant might retain the chattel upon paying for it, and the only manner in which a plaintiff could ensure the return of the chattel was by filing a bill in equity. The bill could be filed only in cases where the chattel was of peculiar value to the owner (*Pusey v. Pusey*, 1 W. & T. L. C., 3rd ed., 735); or where some fiduciary relation existed between the parties (*Wood v. Rowcliffe*, 3 Hare, 304).

Plaintiff's
right to en-
force return.

The plaintiff must obtain an order from a Judge or the Court in order that execution may issue for the return of the chattel without leaving an option to the defendant of paying the value of it. To obtain the order the value of the chattel must have been assessed (*Chilton v. Carrington*, 24 L. J. C. P. 78); where also it was held that an order made by a Judge may be reviewed by the Court.

Under the 2nd section of the Mercantile Law Amendment Act (19 & 20 Vict., c. 97, *post*, in the Appendix), the plaintiff may, in actions

for non-delivery of goods, obtain execution for delivery of the goods by order of the Court or Judge.

As to the right of a defendant to return the chattel, and so escape from the liability of paying the value of it, the Court will in cases where no special damage is alleged, or only colourably so, allow the defendant before judgment to return the chattel, upon payment of costs and a nominal sum for damages (*Gallagher v. Nolan*, 9 Ir. Jur. N. S. 382; Ch. Ar. Pr., 12th ed., p. 1378). The plaintiff will, however, in such cases be allowed the option of proceeding with the action at his own risk for the purpose of recovering further damages, if he claims such (*Lyons v. Keller*, 9 Ir. Jur. N. S. 381); and see *Lloyd v. Sadleir*, 7 Ir. Jur. N. S. 15.

Defendant's
right to re-
turn chattel.

81. In all cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought an action, he may, in like case and manner as herein-before provided with respect to mandamus, claim a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right; and he may also in the same action include a claim for damages or other redress (u).

Claim of
writ of
injunction.
17 & 18 Vict.
c. 125, s. 79.

(u) This and the following sections provide a specific remedy against the repetition or continuance of a breach of contract or other injury. Formerly the plaintiff's only means of obtaining such a remedy was by a suit in a court of equity.

Injunction.

It should be borne in mind that in order to enable a plaintiff to take advantage of this and the following sections there must be a legal right vested in him, and a violation of such right giving a cause of action. Until the right is actually invaded he cannot bring an action of injunction, although it may be perfectly certain that the defendant is about to violate it; and even if the plaintiff succeeds in the action the writ will not be issued without the order of the Court (sec. 84). It may, however, where the circumstances of the case require it, be issued before judgment (see same section).

When remedy applicable

The Act provides that the writ may be claimed "in all cases of breach of contract or other injury"—words much more extensive than those employed in the section relating to mandamus, and the remedy, therefore, is of wider application. Thus, in an action for an infringement of a plaintiff's copyright, an injunction may be claimed to restrain the defendant from selling copies (*Mayall v. Higby*, 1 H. & C. 148). So, also, the writ may be claimed in an action for an obstruction to ancient lights (*Jessel v. Chaplin*, 2 Jur. N. S. 931); or to a watercourse; or in an action for breach of a covenant for quiet enjoyment contained in a mining lease, where the disturbance complained of consists in working the surface so as to interfere with the mining operations (*Shaw v. Stenton*, 2 H. & N. 858). Where, however, there is an agreement to pay a sum by way of liquidated damages for breach of contract, the Court will not grant the writ (*Carnes v. Nesbitt*, 7 H. & N. 158). An injunction may be prayed for in an action for a nuisance (*De le Rue v. Fortescue*, 2 H. & N.

Mandatory
injunction.

324). Again, the writ may be claimed, although in effect by restraining the defendant from a continuance of the breach it requires him to do some positive act. Thus, in *Tate v. Devlin*, 3 Ir. Jur. N. S. 341, where an action had been brought for a breach of a covenant to build in a particular way, and the defendant continued to build in the manner complained of, a conditional order was granted for an injunction to compel the defendant to take down the erections; and a similar order was made in *Jessel v. Chaplin*, 2 Jur. N. S. 931, a case of an obstruction to ancient lights. Where, however, the breach consists in *non-feasance*, the statute, it would appear, does not apply. A mandamus is then the proper remedy, if the Court has jurisdiction to grant it. Again, where the ordinary remedy in the action is in its nature *specific*, the writ cannot be claimed, as in an action of ejectment (*Baylis v. Legros*, 2 C. B. N. S. 316). And besides the class of cases mentioned, the Court will, in the exercise of its discretion, refuse to allow the writ to be issued whenever it considers that under the circumstances it would not be an appropriate remedy; see sec. 84.

Non-
feasance.

Where remedy
specific.

Form of writ of summons and endorsement thereon.
17 & 18 Vict.
c. 125, s. 80.

82. The writ of summons and plaint in such action shall be in the same form as the writ of summons and plaint in any personal action; but on every such writ and copy thereof there shall be endorsed a notice that in default of appearance the plaintiff may, besides proceeding to judgment and execution for damages and costs, apply for and obtain a writ of injunction (*v*).

Form of writ.

(*v*) For a form of declaration, see Bullen and Leake, Pr. Pl., 2nd ed. p. 296. Care must be taken to endorse the writ with the notice mentioned in the section. For a form of notice, see the English forms of proceeding, M. V. 1854, No. 36.

Form of proceedings and of judgment.
17 & 18 Vict.
c. 125, s. 81.

83. The proceedings in such action shall be the same, as nearly as may be, and subject to the like control, as the proceedings in an action to obtain a mandamus under the provisions hereinbefore contained; and in such action judgment may be given that the writ of injunction do or do not issue, as justice may require; and in case of disobedience such writ of injunction may be enforced by attachment by the Court or by a Judge (*w*).

Pleadings.

(*w*) As to the pleadings in such an action a distinction must be drawn between pleading to the breach of contract or other injury complained of and pleading to the claim for a writ of injunction. As a general rule a defendant cannot plead to the claim for a writ of injunction (*Booth v. Taylor*, L. R. 1 Ex. 51); neither can he demur to it (*Bilk v. London, Chatham, and Dover Railway Co.*, 3 H. & C. 95). In fact as the issuing of the writ is a matter for the discretion of the Court, the proper stage of the proceedings at which to decide whether it shall issue or not is when the application for it comes to be made. And as the Court will in general grant a conditional order only in the first instance, the defendant should reserve whatever case

he has to make against the issuing of the writ, until showing cause. It follows that the decision of the Court as to the issuing of the writ cannot be reviewed in a Court of Error. These considerations are, however, applicable only to cases where the jurisdiction conferred by the statute exists, and where the defendant is seeking to plead matter which goes to show that the Court, in its discretion, should not allow the writ to issue. Whenever it appears that the remedy is not applicable, in consequence of the provisions of the Act conferring no jurisdiction, as in the case of an action of ejectment, there is no reason why the plaintiff should not at once demur (*Bilke v. London, Chatham, and Dover Railway Co.*, 3 H. & C. 95), or perhaps apply to set the writ aside.

As to the question of costs, see sections 72 and 74, *ante*.

84. It shall be lawful for the plaintiff, at any time after the commencement of the action, and whether before or after judgment, to apply *ex parte* (x) to the Court or a Judge for a writ of injunction (y) to restrain the defendant in such action from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right; and such writ may be granted or denied by the Court or Judge, upon such terms (z) as to the duration of the writ, keeping an account, giving security, or otherwise, as to such Court or Judge shall seem reasonable and just, and in case of disobedience such writ may be enforced by attachment: provided always, that any order for a writ of injunction made by a Judge, or any writ issued by virtue thereof, may be discharged or varied or set aside by the Court, on application made thereto by any party dissatisfied with such order.

Writs of injunction may be applied for at any stage of the cause. 17 & 18 Vict. c. 125, s. 82.

(x) A conditional order only will be made in the first instance (*Gettings v. Symes*, 15 C. B. 362; *Tate v. Devlin*, 3 Ir. Jur. N. S. 341.)

(y) The granting of the writ lies in the discretion of the Court. Therefore where the plaintiff had commenced an action for liquidated damages for the breach complained of, the Court refused the application (*Carnes v. Nesbitt*, 7 H. & N. 158); and see *Young v. Chalkley*, 15 W. R. 743. So, also, where it is impossible for the defendant to comply with the writ—as in a case where an action was brought against a tenant for building in breach of a covenant, and it appeared that the buildings had been erected by an undertenant—the Court will not make the order (*London and S. W. R. Co. v. Webb*, 15 C. B. N. S. 450); and see *Matthews v. King*, 3 H. & C. 910.

Issuing of writ lies in discretion of Court.

(z) In *Longfield v. Cashman*, 11 Ir. C. L. R. Ap. 23, the Court in granting the writ put the plaintiff under terms to speed the action and to pay the defendant, in case a verdict was found for him, any sum which the jury should award to him as compensation for the damage sustained by the interference of the Court. And see, also, as to the terms, Ch. Ar. Pr. 12th ed., p. 1120.

Terms.

Equitable defence may be pleaded. 17 & 18 Vict. c. 123, s. 83.

85. It shall be lawful for the defendant in any action, and for the plaintiff in any action for replevin of goods, in any of the Superior Courts, in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitle him to such relief, and the said Courts are hereby empowered to receive such pleading, provided that such pleading shall begin with the words "for defence on equitable grounds," or words to the like effect (a).

General principles applicable to equitable pleadings.

Relief applicable should be unconditional.

Taking accounts.

Nature of equity ruled on.

(a) The power given by the present section, and by sect. 87, *post*, of pleading equitable defences and replications, has been largely exercised and the principles on which the Courts act in allowing or disallowing such pleadings are now well settled. In order that a party may be able to plead on equitable grounds, the facts relied on by him must be such as would entitle him in equity to an absolute and perpetual injunction against the judgment in the action, and not merely to a temporary or conditional injunction (*Wodehouse v. Farebrother*, 5 El. & Bl. 277). The Court cannot pronounce a conditional judgment (*id.*); and if the decree which a Court of Equity would pronounce would not be simple and final, but would be clogged with conditions or preliminaries which the forms of common law judgments or the machinery of its procedure are not adapted for directing or carrying out, the party will be left to his remedy in the Court of Equity (*Colles v. Prendergast*, 10 Ir. C. L. R. 336), in which case the principles on which the Courts of Common Law act in allowing equitable pleadings will be found fully discussed in the judgment of *Christian, J.* If therefore a Court of Equity would require the execution of an instrument, such as a surrender or a lease, as a condition precedent to granting relief, the equitable pleading will be bad (*Mines Royal Societies v. Magnay*, 10 Ex. 489; *Toole v. Ryder*, Ir. R. 2 C. L. 652; *Deering v. Lawler*, 7 Ir. C. L. R. 333). So, also, if a Court of Equity, as part of its decree, would direct an instrument to be reformed, the pleading will be bad (*Solvency Guarantee Company v. Freeman*, 7 H. & N. 17; and see further, the cases referred to *infra*, under the head of "mistake"). It has in some cases been considered, that if the allowing of the pleading would involve the taking of accounts, it cannot be allowed (*Cochrane v. Camack*, 7 Ir. C. L. R. 10; *Considine v. Tubbedy*, 2 Ir. Jur. N. S. 188; *Collins v. Prendergast*, 7 Ir. C. L. R. 542); but it would appear, that such an objection is not fatal (*Marcom v. Bloxam*, 11 Ex. 516), and having regard to the facilities which courts of law now possess for the taking of accounts, the objection is not entitled to so much weight as formerly.

The equity relied on by a party seeking to plead on equitable grounds must be such as is cognizable in a Court of Equity. An equitable defence of mistake must, therefore, show that the mistake was mutual (*Maswrel v. Harrison*, 4 Ir. Jur. N. S. 119; *Scott v. Littledale*, 8 El. & Bl. 815). So also, in an action for the value of coal wrongfully taken out of the plaintiff's mine, a replication to a plea of the Statute of Limitations, that the wrongful taking was fraudulently concealed until within six years before suit was disallowed, on the ground that a Court of Equity would not restrain the defendant from setting up such a defence (*Hunter v. Gibbon*, 1 H. & N. 459); so also, in an action against a surety, mere negligence, even though gross, on the part

of the creditor, unaccompanied by positive acts of concurrence in the defalcation of the principal, furnishes no ground of equitable defence (*Madden v. McMullen*, 13 Ir. C. L. R. 305; and see *Daniel v. M'Carthy*, 7 Ir. C. L. R. 23). As to pleading an equitable defence for the purpose of avoiding circuitry of action, see *Minshull v. Oakes*, 2 H. & N. 793; *Wood v. Copper Miners*, 17 C. B. 561; and as to the nature of equitable replications, see note (b), *post*.

Assuming that an equitable pleading is not open to objection on any of the grounds referred to, it will be an answer to the previous pleading, and the cases in which such pleadings have been pleaded are accordingly exceedingly numerous. Thus, on the principle that equity will relieve the parties to a contract against the consequence of a mutual mistake, provided the mistake be a mistake of fact, or a mistake of fact and law (*Midland Great Western Railway Co. of Ireland v. Johnson*, 6 H. L. Cas. 798; *Broughton v. Hutt*, 3 De G. & J. 501), if the plaintiff or defendant rely upon a written instrument as furnishing a ground of action or defence, an equitable defence or replication, showing that the instrument was executed under a mutual mistake, such as that mentioned, will be good, except in cases where the Court of Equity would require the instrument to be rectified, as a condition precedent to restraining the action (*Vorley v. Barrett*, 1 C. B. N. S. 225; *Steele v. Haddock*, 10 Ex. 643; *Luce v. Izod*, 1 H. & N. 245; *Borrowman v. Rossell*, 16 C. B. N. S. 58; and the principle applies to contracts executory as well as executed (*Kane v. Dublin & Wicklow Rly. Co.*, 3 Ir. Jur. N. S. 160). An equitable plea, therefore, alleging that the defendant by mistake executed a charter party, so as to render himself personally liable, whereas the real agreement was that he was to execute it merely as the agent of a third party, has been held to be good (*Wake v. Harrop*, 1 H. & C. 202; and see *Burgoyne v. Cottrell*, 24 L. J. Q. B. 28). If, however, under the circumstances, a Court of Equity would require the instrument to be reformed, as a condition precedent to granting relief, the plea or replication will be bad (*McGillicuddy v. Gallwey*, 1r. R. 2 C. L. 237; *Solvency Guarantee Co. v. Freeman*, 7 H. & N. 17; *Perez v. Oleaga*, 11 Ex. 506). A replication on equitable grounds that a release by deed was executed in mistake as to its legal effect, was held to be bad for the same reason (*Read v. Johnson*, 25 L. J. Ex. 110). As appears, however, from the cases above referred to, it is frequently unnecessary that the instrument should be reformed, and where no object would be served by so doing, the equitable defence will be good (*Steele v. Haddock*, 10 Ex. 643; *Luce v. Izod*, 1 H. & N. 245). In *Lyall v. Edwards*, 6 H. & N. 337, a replication to a plea of release, that the release was worded by mistake so to include the cause of action sued on, was held to be good.

Mistake.

Parol contemporaneous variation.

An equitable defence, relying on a parol contemporaneous variation of a written contract, was held to be good in *Rogers v. Hadley*, 2 H. & C. 227. Where, to an action by drawer against acceptor of a bill of exchange, at three months, the defendant pleaded that the plaintiff represented to him that the bill was drawn as of a later date than the date it really bore, and that three months from the later date had not elapsed, the Court set the plea aside (*Druin v. Harvey*, 17 C. B. 257; and see *Borrowman v. Rossell*, 16 C. B. N. S. 58. In *Wood v. Dwarries*, 11 Ex. 493, an equitable replication asserting that the plaintiff effected a life policy upon the faith of a prospectus published by the insurer, that all policies should be indisputable, except in case of fraud, was held to be good. See, however, as to this case *Wheelton*

- Waiver.** *v. Hardisty*, 8 E. & B. 232; and in *Reis v. Scottish Equitable Assurance Co.*, 2 H. & N. 19, the defendants having pleaded that the party assured travelled beyond Europe, contrary to the terms of the policy, the Court refused to allow the plaintiff to reply on equitable grounds, that the policy was made upon the express agreement that the assured might go out of Europe without vitiating the policy. As to pleading a waiver of one of the terms of a contract, see *Fitzgerald v. McCullough*, 7 Ir. C. L. R. 457; *Thames Ironworks Co. v. Royal Mail Steam Packet Co.*, 13 C. B. N. S. 358.
- Acquiescence or false representations.** An equitable defence relying upon the acquiescence or representations, or standing by of the plaintiff, while the defendant was doing the acts complained of, or that he is acting contrary to good faith or agreement, may also be pleaded in a proper case. Thus, to an action for obstructing the plaintiff's lights, and depriving him of support to his buildings, an equitable plea that the grievances complained of were occasioned by his pulling down a house and erecting another in its place, which he did with the acquiescence and consent of the plaintiff, and on the faith of such acquiescence and consent he incurred expense, is a good equitable plea (*Davies v. Marshall*, 10 C. B. N. S. 697), with which case compare *Smith v. Hayes*, 1r. R. 1 C. L. 333, where to an action for an injury to a watercourse, an equitable defence, relying upon particular acts of acquiescence, was held to be bad upon demurrer; and see, also, *Billing v. East India Co.*, 31 L. J. Ex. 240; *Somerville v. Sheals*, 8 Ir. C. L. R. Ap. 65; *Bill v. Richards*, 2 H. & N. 311; *De Rosaz v. Anglo-Italian Bank*, L. R. 5 Q. B. 462; and as to the general principles of equity applicable to cases of acquiescence, see *Ramsden v. Dyson*, L. R. 1 H. L. 129; *Clarke v. Hart*, 6 H. L. Cas. 633, 655. So also an equitable defence or replication of fraud may be pleaded (*Davies v. Marshall*, *ubi supra*), and for an instance of an equitable defence relying upon a fraud upon marital rights (held, however, to be bad) see *Lee v. Hayes*, 17 Ir. C. L. R. 394. In *Bristow v. Brown*, 13 Ir. C. L. R. 201, an equitable defence relying upon a false representation not alleged to have been fraudulent was held to be good, and see for other instances of such defences, *Gorsuch v. Cree*, 8 C. B., N. S., 574, *Drain v. Harvey*, 17 C. B. 257.
- Fraud.** A party to a written instrument cannot allege at law, that he executed it as a surety when it does not appear from the written instrument that he executed in that capacity. In equity, however, it is otherwise (*Story's Eq. Jur.* 8th ed. vol. ii. p. 71); and accordingly equitable defences have been held to be good which allege that the defendant executed a promissory note or other instrument as a surety, and which then show matter of discharge by the giving of time or otherwise (*Pooley v. Harradine*, 7 E. & B. 431; *Murphy v. Glass*, L. R. 2 P. C. 408; *Strong v. Foster*, 17 C. B. 201; *Greenough v. McLellan*, 30 L. J. Q. B. 15; *Gordon v. Rae*, 8 E. & B. 1065); and see *Bristow v. Brown*, 13 Ir. C. L. R. 201, *Watts v. Shuttleworth*, 29 L. J. Ex. 229.
- Principal and surety.** An equitable defence relying upon an equitable ownership, in actions of trespass, &c., will be good. Thus in an action of trespass *qu. cl. fr.* brought by a husband, an equitable plea, alleging that the land was settled to the separate use of the wife, whose lessee the defendant was, was held to be good (*Allen v. Walker*, L. R. 5 Ex. 187); and reference may also be had to *Irrake v. Pywell*, 4 H. & C. 78; *Somerville v. Sheals*, 8 Ir. C. L. R. Ap. 65, where under the circumstances defences of a similar character were held
- Equitable ownership.**

to be bad; and see *Wakley v. Froggatt*, 2 H. & C. 669, in which case a defence relying upon an equitable right to enter and cut down timber was held to be bad, upon the ground that a Court of Equity would not grant an unconditional injunction to restrain the action. Where in an action by one tenant in common against the other for not accounting, the defendant pleaded setting up a title under a conveyance by way of mortgage, an equitable replication that the mortgage debt had been paid off, was not allowed, because the Court could not compel a reconveyance (*Gorely v. Gorely*, 1 H. & N. 144).

Where an action was brought by a husband to recover money which had been settled to the separate use of his wife, but paid to the defendant by her order, a plea that the money was assigned to the defendant by the wife, upon trusts, under which the defendant took no interest, was held to be a good defence (*Sloper v. Cottrell*, 26 L. J. Q. B. 7).

Where to a declaration for money awarded, the defendant pleaded on equitable grounds, that the plaintiff had assigned away the debt, and was suing in fraud of the assignment the plea was held to be good (*Jeffs v. Day*, L. R. 1 Q. B. 373), with which compare *Sainthill v. Evanson*, 7 Ir. C. L. R. 540. Action brought in fraud of equitable right.

Equitable defences of set-off have been frequently pleaded. The mere existence of cross demands does not, however, enable the defendant to plead such a defence. Thus, a plea on equitable grounds to an action for freight, that the plaintiff, in the course of carrying the goods, had negligently damaged them to an amount equal to his claim for freight, was held to be bad on demurrer (*Stinson v. Hall*, 1 H. & N. 831). An equitable defence, however, that the plaintiff (a mortgagee) has paid himself out of the proceeds of property sold under a power of sale is good (*Marcon v. Bloxan*, 11 Ex. 586); and as a general rule, it would appear that, independently of the statutes of set-off, Courts of Equity, in virtue of their general jurisdiction, may grant relief in all cases where, although there are mutual and independent debts, yet there is a mutual credit between the parties, founded at the time upon the existence of some debts due by the crediting party to the other;—by mutual credit, it being understood that there is a knowledge on both sides of an existing debt due to one party, and a credit by the other party, founded on, and trusting to such debt, as a means of discharging it (*Story's Eq. Jur.* 8th ed., vol. 2, p. 658). Thus, in *Tully v. Rouch*, 10 Ir. C. L. R. Ap. 21, an equitable defence to an action for meane rates that the defendant had laid out money in repairs, under an agreement that he should be allowed it in the rent, was held to be good; and see also *Toole v. Ryder*, Ir. R. 2 C. L. 654; *Denniston v. Digan*, 10 Ir. C. L. R. Ap. 7; *Daniel v. McCarthy*, 7 Ir. C. L. R. 23; *Atterbury v. Jarvie*, 2 H. & N. 114. The mere fact that there is a third party interested in the accounts, and who is not before the Court, as where a surety pleads a set-off between the creditor and the principal affecting the subject matter of the demand, is not *per se* a fatal objection to the defence (*Murphy v. Glass*, L. R. 2 P. C. 408). In addition to the cases of set-off referred to above, an equitable defence, showing the existence of a debt, whether legal or equitable, due by the real plaintiff to the defendant, may be pleaded (*Cochrane v. Green*, 9 C. B. N. S. 448; *Colles v. Prendergast*, 10 Ir. C. L. R. 336); and see, as to the principles of equity applicable to such cases, *Cavendish v. Greaves*, 24 Beav. 163; *Watson v.*

Action brought in fraud of equitable right.

Set-off.

Mid-Wales Railway Co., L. R. 2 C. P. 593; *Dickson v. Swansea Vale Railway Co.*, L. R. 4 Q. B. 44.

Equitable
estoppel.

A plea on equitable grounds to the effect that the causes of action in the declaration had been finally adjudicated upon by a decree in Chancery, was held bad on demurrer, because the defendant did not show an equity to an unconditional injunction (*Phelps v. Prothero*, 16 C. B. 370; *Beere v. Fleming*, 13 Ir. C. L. R. 506); and see further as to the effect of proceedings in equity upon proceedings at law, *Collins v. Cave*, 27 L. J. Ex. 146; *Schlumberger v. Lister*, 29 L. J. Q. B. 157; and sec. 189 of the C. L. P. Act, 1853, *ante*, p. 213. An equitable plea of the pendency of an arbitration has been held to be bad (*Wood v. Copper Miners*, 17 C. B. 561). So also has a plea that the defendant has been adjudicated a bankrupt, and that the plaintiff has proved under the bankruptcy (*Spencer v. Demett*, L. R. 1 Ex. 123); and see *Elder v. Beaumont*, 8 El. & Bl. 353.

Ejectment.

According to the practice in England, an equitable plea cannot be pleaded in an action of ejectment (*Neave v. Avery*, 16 C. B. 328). In this country, however, such a defence may be pleaded, either alone or in addition to the usual statutory defence (*Turner v. M'Auley*, 6 Ir. C. L. R. 245); but where the matter of defence relied upon is an agreement for a lease, the defence will be bad, upon the ground that the relief in equity would not be unconditional, as the defendant would be required, as a condition precedent to the granting of an injunction, to execute a lease and pay all arrears of rent due, and a Court of Common Law has no power, in an action of ejectment, of adjusting the rights of the parties (*Turner v. M'Auley*, 6 Ir. C. L. R. 248; *Deering v. Lawler*, 7 Ir. C. L. R. 333). Neither can the defendant rely upon a lease granted in excess of a leasing power, but operating in equity under the 12th and 13th Vict. c. 26, s. 2, as a contract for the grant of a valid lease (*Deering v. Lawler*, *ubi supra*; *Carpenter v. Larkin*, 5 Ir. Jur. N. S. 174). Although, however, an agreement for a lease cannot be pleaded by way of equitable defence, a defence averring that the defendant was a tenant from year to year, and that the plaintiff for good consideration promised not to terminate the yearly tenancy by notice to quit or otherwise, but that in all other respects the defendant should hold as tenant from year to year, and that no lease should be executed, has been held to be so far good, that the Court refused to set it aside on motion (*Clarke v. Reilly*, Ir. R. 2 C. L. 422). As to pleading, in an action of ejectment brought by a mortgagee, that the mortgage has been paid off, see *Considine v. Tubbledy*, 2 Ir. Jur. N. S. 188; *Gorely v. Gorely*, 1 H. & N. 144. In *Maloney v. Lindsay*, 2 Ir. Jur. N. S. 332, an equitable defence, which averred that the defendant held the lands under an agreement that he should remain in until repaid a sum of £100 by the plaintiff, which sum had not been repaid, was allowed to be pleaded. As to pleading a reduction of the rent reserved in a lease, see *Blake v. Hanly*, 7 Ir. Jur. N. S. 238.

Reduction of
rent.

An equitable defence cannot be pleaded in answer to a claim for a writ of injunction under sec. 81, *ante*, p. 347 (*Booth v. Taylor*, L. R. 1 Ex. 51).

May be sup-
ported on
legal
grounds.

When a defence is expressly pleaded upon equitable grounds, it may be supported upon legal grounds (*Lee v. Hayes*, 17 Ir. C. L. R. 394; *Hyde v. Graham*, 1 H. & C. 593). An equitable pleading renders all the subsequent pleadings equitable (*Savin v. Hoylake Railway Co.*, L. R. 1 Ex. 9). A party will not be allowed to plead on equitable grounds facts which he has pending the action set up in a Court of Equity as entitling him to relief, in a proceeding instituted there with reference to the subject matter of the action (*Schlumberger v. Lister*, 2 El. & Bl. 855). Where a defendant pleads at law

equity will not interfere by injunction to restrain the action, on the grounds relied on by the plea, when the Court of Law can give the same relief as a Court of Equity (*Waterlow v. Bacon*, L. R. 2 Eq. 514; *Evans v. Bremridge*, 6 D. M. & G. 100). But when a defendant has an equitable defence he is not compelled to plead it, but may proceed in equity to restrain the action (*Kingsford v. Swinford*, 28 L. J. Ch. 413; *Gompertz v. Pooley*, 4 Drew, 448; *Evans v. Bremridge*, 2 Kay & J. 174, affirmed on appeal, 8 D. M. & G. 100).

Using matter of defence both at law and in equity.

As to the course to be adopted by a party who objects to the validity of an equitable defence, see sect. 88, *post*.

86. Any such matter which, if it arose before or during the time for pleading, would be an answer to the action if pleaded, may if it arise after the lapse of the period during which it could be pleaded, be set up by way of *audita querela*, or in such other manner as the Judges may by any general rules or orders direct.

Equitable defence after judgment. 17 & 18 Vict. c. 125, s. 84.

87. It shall be lawful for the Court or a Judge to permit any of the parties to reply in answer to any pleading of the opposite party facts which avoid such pleading upon equitable grounds, provided that such reply shall begin with the words "for replication on equitable grounds," or words to the like effect (*b*).

Equitable replication. 17 & 18 Vict. c. 125, s. 85.

(*b*) As before mentioned, when an equitable defence is pleaded, the subsequent pleadings are to be treated as equitable, *ante*, p. 354. As to equitable rejoinders, see *Wodehouse v. Farebrother*, 1 Jur. N. S. 998, 999, n.

As regards the principles applicable to equitable replications they are in general the same as those which apply to equitable defences, as to which see *ante*, p. 350, note (*a*), where also, several of the cases in which equitable replications have been pleaded will be found referred to. In addition, however, to the principles applicable to equitable pleadings in general, equitable replications are subject to this special rule, that they must not disclose facts inconsistent with the legal right relied on in the declaration or summons and plaint. In other words they must show that the plaintiff's right is legal in its nature, and not merely a right to file a bill in equity. Thus, although an infant or married woman by representing themselves to be of full age or *discovert*, respectively, may render themselves liable in equity to a performance of their contracts (*Ex parte King*, 1 De G. & J. B. Ap. 243, *Faughan v. Vanderstegen* 2 Drew, 165, 369), yet, a plaintiff at law cannot, in answer to a plea of infancy or coverture, reply on equitable grounds a fraudulent representation so made (*De Roo v. Foster*, 12 C. B. N. S. 272; *Bartlett v. Wells*, 1 B. & S. 836). So, also, a fraudulent concealment of a cause of action cannot be pleaded in reply to a plea of the Statute of Limitations (*Hunter v. Gibbons*, 1 H. & N. 459; and see *Imperial Gas Co. v. London Gas Co.*, 10 Ex. 39; *Supple v. Cann* 9 Ir. C. L. R. 1.) Where in answer to a plea of the Statute of Limitations pleaded by an executor, the plaintiff replied on equitable grounds that the testator had bequeathed sufficient money to the

Equitable replication.

Must not show right of action to be equitable merely.

Where Statute Limitations pleaded.

Parol discharge.

defendant on trust to pay the debt, the replication was held to be bad (*Gulliver v. Gulliver*, 1 H. & N. 174). So, also, a parol discharge from a stipulation contained in a deed or a contemporaneous parol variation of a term in a contract reduced into writing, cannot, in general, be relied on by way of reply to a plea or defence founded on the stipulation or term so varied. See *Thames Ironworks Co. v. Royal Mail Steam Packet Co.*, 13 C. B. N. S. 358; *Reis v. Scottish Equitable Life Assurance Co.*, 2 H. & N. 19; and the other cases referred to, *ante*, p. 351. Where to an action for work and labour the defendant pleaded setting out the conditions of a certain deed between the parties, and *inter alia*, that it was necessary that the plaintiff should obtain the certificate of an engineer, and that the certificate had not been obtained; the Court refused to allow the plaintiff to reply on equitable grounds that the engineer was in collusion with the defendant for the purpose of withholding from the plaintiff the moneys justly due to him (*Killen v. Byrne*, 3 Ir. Jur. N. S. 91). Where, however, the matter relied on does not contradict the legal right relied on by the declaration, but merely goes to show that it is inequitable for the defendant to rely upon the legal defence he has pleaded, the replication will be good. Thus where a release was pleaded, an equitable replication alleging that the plaintiff was merely a trustee of the money sought to be recovered, and that the release was, as the defendant knew, executed in fraud of the *cestuique trust*, was held to be good (*De Pothonier v. De Mattos*, El. Bl. & El. 461); and see *Lyall v. Edwards*, 6 H. & N. 337; *Wilson v. Gabriel*, 4 B. & S. 243; and as to the power of the Court at Common Law to set aside a plea relying on a fraudulent release, see 2 Sm. L. C. 5th ed., p. 351. Where to an action on the money counts the defendant pleaded that he had with the plaintiff's consent delivered a promissory note on account of the debt to a third party who still held it, an equitable replication, alleging that the third party was a trustee for the plaintiff's, of which the defendant had notice, and that the note was overdue and unpaid, was held to be good (*National Savings Banks Association v. Tranah*, L. R. 2. C. P. 556).

Where replication good.

Court or Judge may strike out equitable plea or replication. 17 c. 18 Vict. c. 125, s. 86.

88. If it shall appear to the Court or a Judge that any such equitable pleading cannot be dealt with by a Court of Law so as to do justice between the parties, it shall be lawful for such Court or Judge to order the same to be struck out, on such terms, as to costs and otherwise, as may seem reasonable (c).

Demurring.

(c) In place of applying to have the equitable pleading struck out, the party may demur (*Turner v. M'Auley*, 6 Ir. C. L. R. 248); and when the question in the cause is fairly arguable the proper course is to demur (*Bergoyne v. Cottrell*, 24 L. J. Q. B. 28; *Elliott v. Mason*, 26 L. J. Ex. 175; *Ciarke v. Reilly*, 1r. R. 2 C. L. 422).

Superior Courts of Common Law may in action of ejectment

89. It shall and may be lawful for any of the superior Courts of Common Law in *Ireland*, in any action of ejectment on the title to be commenced after the passing of this Act, to make an order directing temporary bars to be waived and the real title tried in such ejectment, in any case in which it shall

be made to appear to the satisfaction of such Court that a decree or decretal order to the same effect would be pronounced by the Court of Chancery upon a bill or cause petition filed for the purpose of having temporary bars waived, but upon such terms or conditions as to said Court shall seem just (*d*).

order real
title to be
tried in such
ejectment.

(*d*) There is no section in the English Common Law Procedure Acts corresponding to the above.

Formerly no power was possessed by a Court of Law of preventing a defendant in ejectment from setting up, in answer to the action, the existence of an outstanding legal term or estate, even though the term or estate was held in trust for the plaintiff. A Court of Equity would, however, upon the principle of preventing undue and vexatious litigation, restrain the defendant from making an inequitable use of such a defence. In such cases the equitable jurisdiction was auxiliary to the administration of justice in the Court of Law, and where there was no counter equity the Court would never refuse to remove temporary bars, to enable the parties to try their right (*Biennerkassett v. Day*, 2 Ball & B. 132, 137, per Lord Manners, C). Inasmuch, however, as the Court proceeded upon the principle that the party in possession ought not in conscience to use an accidental advantage, to protect his possession against a real right in his adversary, if there was any counter equity in the circumstances of the case which met the reasoning upon the principle, as for instance, if fraud was imputable to the plaintiff, or the defendant was a purchaser for valuable consideration and without notice, the Court would not interfere (see *Wall v. Wilkinson*, 8 Ir. Ch. R. 326); and in general it should be shown that it would be inequitable on the part of the defendant to set up the outstanding term. In *Fraund v. Turner*, Fitz. 105, it seems to have been considered that a volunteer had no equity to restrain the setting up of a term.

No power at
Common
Law to re-
strain the
setting up of
temporary
bars.

Jurisdiction
of Courts of
Equity.

By the above section the same powers have been conferred upon the Courts of Law of ordering temporary bars to be waived, which were formerly exercised by the Courts of Equity, and accordingly the Courts of Law act upon the same principles as were formerly acted upon in Equity. Thus, where an action was brought by a devisee claiming under a will, the defendant was restrained from setting up certain leases which had been made by the testator (*Fitzgerald v. Westropp*, 7 Ir. C. L. R. 473); and in *Olden v. Stokes*, 7 Ir. C. L. R. 602, a defendant was restrained from setting up a lease granted by the plaintiff expectant on the determination of the defendant's interest.

Statutory
power.

When exer-
cised.

Where an action of ejectment was brought by a tenant in tail under a settlement, against certain squatters who had taken possession during the life of the tenant for life, the defendants were restrained from setting up the prior estates limited by the settlement, to trustees for payment of portions, &c. (*Eagar v. Maunsell*, 1r. R. 1 C. L. 159). In *Baker v. Mellish*, 10 Ves. 544, it was held that a landlord against whom a judgment had been obtained in ejectment by reason of his own negligence, has an equity to restrain his tenant and those to whom he had attorned from setting up the lease in answer to an ejectment brought by him. And see also, *Griffiths v. Edwards*, 2 Jur. N. S. 584.

Nature of the bar which may be ordered to be waived.

As regards the nature of the bar which may be ordered to be waived, it should be remembered, as stated in *Stansbury v. Arkwright*, 6 Sim. 481, 485, that an outstanding legal estate may be such as to make it impossible for the plaintiff to recover in ejectment. If for instance (where the ejectment is brought by a devisee), the legal estate was not vested in the testator when he made the will, the plaintiff on his own showing could not recover in ejectment. In *Bleinerhassett v. Day*, 2 B. & B., 132, 137, it seems to have been considered that though the whole legal estate was vested in a mortgagee, the Court might restrain the setting up of the outstanding mortgage by the defendant, and see *Eagar v. Maunsell*, Ir. R. 1 C. L. 159; see, however, *Taylor v. Larkin*, 5 Ir. Jur. N. S. 17. In *Thornton v. Court*, 3 D. M. & G. 293, an action having been brought upon a covenant for quiet enjoyment, the defendant was restrained from setting up by way of plea an assignment of his entire interest made by the plaintiff to a mortgagee. The distinction would seem to be between cases where the plaintiff never had a legal estate, and where, although he had a legal estate, he has parted with it for some temporary purpose, or has carved a lesser interest out of it.

How order to be obtained.

As regards the application it must be made upon notice. As to whether the application must be made to the Court or may be moved before a Judge in Chamber see *Eagar v. Maunsell*, Ir. R. 1 C. L. 159; *Taylor v. Larkin*, 5 Ir. Jur. N. S. 173 (n). In the former of those cases it was held that the notice of motion need not specify the particular estates, the setting up of which it is sought to restrain; and an order will be made in general terms that temporary bars be waived and the real title in the action between plaintiff and defendants be tried. The plaintiff must show in support of his application the existence of an outstanding estate, or the probability of one being set up. As to the form of affidavit in support of the application, see *Eagar v. Maunsell*, *ubi supra*.

Actions on lost instruments, 17 & 18 Vict. c. 125, s. 87.

90. In case of any action founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the Court or a Judge to order that the loss of such instrument shall not be set up, provided an indemnity is given, to the satisfaction of the Court, Judge, or Master, against the claims of any other person upon such negotiable instrument (e).

Loss of a negotiable instrument.

(e) In an action upon a negotiable instrument, a defence alleging that the instrument has been lost is, at Common Law, a good answer to the action (*Ramsay v. Crowe*, 1 Ex. 167); and where in place of suing upon the bill, &c., the plaintiff sues upon the consideration, a defence alleging that the defendant has given a negotiable instrument in payment, which has been lost, is good (*Crowe v. Clay*, 9 Ex. 604). As to relying upon such a defence in the case of a circular note, see *Conflans Stone Quarry Co. v. Parker*, L. R. 3 C. P. 1. Where, however, the bill has been destroyed, the destruction is no answer to the action (*Wright v. Lord Maidstone*, 1 Kay. & J. 701); and secondary evidence is admissible (*Blackie v. Pedling*, 6 C. B. 196); and where the loss of the instrument is relied on, such loss must be specially pleaded, otherwise secondary evidence is admissible (*Charnley v. Grundy*, 14 C. B. 608). Where the instrument is not negotiable, the loss of it is no answer to the action (*Wain v. Bailey*, 10 A. & E. 616).

Where bill destroyed.

Such then being the rules of the Common Law applicable to actions on lost instruments, the only remedy open to a plaintiff where such a defence was raised, was by proceeding in Equity to enforce the delivery of a new bill or note, or payment upon giving a proper indemnity. See Byles on Bills, 10th ed., p. 376. By the present section it is, however, no longer necessary to proceed in Equity in such cases, and the Court of Law may prevent the loss from being set up upon a proper indemnity being given. An action upon a bank note is within the provisions of the Act (*McDonnell v. Murray*, 9 Ir. C. L. R. 495); and in *Ringrose v. Blizzard*, 2 F. & F. 375, the action having been brought upon the consideration, it was held that the Court might under the above section restrain the defendant from pleading a lost bill. It may be doubted, however, whether the ruling in that case was correct; and in *Nash v. Macken*, Ir. R. 5 C. L. 51, the Court of Exchequer, under similar circumstances, allowed the plaintiff to amend by inserting a count upon the bill.

Proceeding
in Equity.

In what cases
the section
applies.

As to the procedure to be adopted by a plaintiff who seeks to avail himself of the provisions of the Act, see *Clarke v. Bowman*, 7 Ir. C. L. R. 49. It will be prudent to serve a proper consent before applying to the Court. A bond is the proper instrument of indemnity to be given (*Clarke v. Bowman*, *ubi supra*).

Procedure.

Staying
action.

There is no power under this section to order a stay of proceedings, upon the application of the defendant, although the defendant undertakes to pay the debt and costs (*Arangare v. Scholefield*, 1 H. & N. 494).

Jurisdiction
under
17 & 18 Vict.
c. 104.
17 & 18 Vict.
c. 125, s. 88.

91. The Superior Courts or any Judge thereof may, upon summary application, by rule or order, exercise such and the like jurisdiction as may, under section 514 of the Merchant Shipping Act, 1854, be exercised by any Court of Equity (f).

(f) By that section it is provided that "in cases where any liability has been or is alleged to have been incurred by any owner in respect of loss of life, personal injury, or loss of or damage to ships, boats, or goods, the several claims are made or apprehended in respect of such liability, then, subject to the right hereinbefore given to the Board of Trade of recovering damages in the United Kingdom in respect of loss of life or personal injury, it shall be lawful in England or Ireland for the High Court of Chancery, and in Scotland for the Court of Session, and in any British possession for any competent Court, to entertain proceedings at the suit of any owner for the purpose of determining the amount of such liability, subject as aforesaid, and for the distribution of such amount rateably amongst the several claimants, with power for any such Court to stop all actions and suits pending in any other Court in relation to the same subject matter; and any proceedings entertained by such Court of Chancery or Court of Session, or other competent Court, may be conducted in such manner and subject to such regulations as to making any persons interested parties to the same, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of costs, as the Court thinks just."

Proceedings
in case of
several claims
being made
on owner of
ship.

92. Any person who shall, upon any examination upon oath or affirmation, or in any affidavit in proceedings under

Penalty on
giving false
evidence.

17 & 18 Vict.
c. 125, s. 89.

this Act, wilfully and corruptly give false evidence, or wilfully and corruptly swear or affirm anything which shall be false, being convicted thereof, shall be liable to the penalties of wilful and corrupt perjury.

Power to
compel con-
tinuance or
abandonment
of action in
case of death
of parties.
17 & 18 Vict.
c. 125, s. 92.

93. Where an action would, but for the provisions of "The Common Law Procedure Amendment Act (*Ireland*), 1853," have abated by reason of the death of either party, and in which the proceedings may be revived and continued under that Act, the defendant or person against whom the action may be so continued may apply by notice to compel the plaintiff, or person entitled to proceed with the action in the room of the plaintiff, to proceed according to the provisions of the said Act within such time as the Court or Judge shall order; and in default of such proceeding the defendant or other person against whom the action may be so continued as aforesaid shall be entitled to enter a suggestion of such default, and of the representative character of the person by or against whom the action may be proceeded with, as the case may be, and to have judgment for the costs of the action and suggestion against the plaintiff, or against the person entitled to proceed in his room, as the case may be, and in the latter case to be levied off the goods of the testator or intestate (g).

When defen-
dant may
proceed
independ-
ently of
above
section.

(g) Under the provisions of the C. L. P. Act, 1853, enabling an action to be proceeded with in case of the death of either party (*ante*, pp. 180-189), there were only two cases in which the defendant or his representative could take proceedings to continue the action. The first was where one of several plaintiffs or defendants died (*ante*, p. 182), the other was where the death took place between verdict or nonsuit and judgment, and the judgment was entered within two terms (*ante*, p. 186). In the other cases provided for by the Act—that is to say, in the case of the death of a sole or surviving plaintiff or defendant, or where the death took place between interlocutory and final judgment, the plaintiff or his representative was the only party who could proceed. Now, however, the defendant may in the several cases referred to proceed in the manner prescribed above.

Independent of the statutory provisions referred to, the defendant or his representative may in certain cases mark judgment after death, *nunc pro tunc* (*ante*, p. 181); and as to allowing the representative of a deceased defendant to move for a new trial, see *ante*, p. 187.

When defen-
dant may
proceed
under above
section.

The defendant or his representative cannot proceed under this section in any cases other than where the right survives (*Maddison v. Leirrim*, 1r. R. 3 C. L. 601; *Chamberlaine v. Drumgoole*, 13 Ir. C. L. R. Ap. 1). In the latter case an action was brought against an executor as such, and the defendant having died it was held that his executor could not apply to the Court under the present section, upon the ground that the action did not survive against the personal representative of the deceased defendant, within

the meaning of the section; and it was also questioned whether such a motion is grantable as of right.

The section does not state what the effect of a suggestion entered as above is, or whether it is equivalent to a peremptory order entered under sect. 106 of the C. L. P. Act, 1853. It is to be presumed that it is so. No time, as may be observed, is fixed within which the application is to be made or the suggestion entered, and so far the defendant or his representative is in a more favourable position than an ordinary defendant under the section referred to.

Effect of suggestion.

94. A judgment in an action of ejectment under the Common Law Procedure Amendment Act (*Ireland*), 1853, shall have no greater effect than a judgment in an ejectment before the passing of an Act made in the Session of Parliament holden in the thirteenth and fourteenth years of the reign of the Queen, chapter eighteen (*h*).

Effect of a judgment in ejectment.

(*h*) The above section was rendered necessary by the case of *O'Donnell v. Ryan*, 7 Ir. Jur. O. S. 127, where it was held by the Court of Exchequer that a judgment in ejectment was conclusive between the parties. Such a judgment, however, is not conclusive, and the unsuccessful party may bring as many actions of ejectment as he may think fit, subject to the provisions of the following section.

95. If any person shall bring an action of ejectment after a prior action of ejectment for the same premises has been or shall have been unsuccessfully brought by such person, or by any person through or under whom he claims, against the same defendant, or against any person through or under whom he defends, the Court or a Judge may, on the application of the defendant, at any time order that the plaintiff shall give to the defendant security for the payment of the defendant's costs, and that all further proceedings in the cause shall be stayed until such security be given, whether the prior action has been or shall have been disposed of by discontinuance, or by nonsuit, or by judgment for the defendant.

Claimant in a second ejectment for the same premises against the same defendant may be ordered to give security for costs. 17 & 18 Vict. c. 125, s. 93.

96. Section 239 of "The Common Law Procedure Amendment Act (*Ireland*), 1853," is hereby repealed, and the superior Courts may appoint and hold sittings either in Banc, or for the trial of issues in fact by Judge or jury, and the Court of Error in the Exchequer Chamber may hold its sittings at any time or times, whether in term or vacation, not being between the first of *August* and the twentieth of *October*.

Courts may appoint sittings 17 & 18 Vict. c. 125, s. 96.

97. If in any action of contract brought after the commencement of this Act in the superior Courts (save for breach of promise of marriage), when the parties (*i*) reside within

Limitation of costs in certain cases.

9 & 10 Vict.
c. 95, s. 58.
13 & 14 Vict.
c. 61, s. 11.

the jurisdiction of the Civil Bill Court of the county in which the cause of action has arisen (*j*), the plaintiff (*k*) shall recover (*l*), exclusive of costs, a sum less than twenty pounds, or in any action for any wrong or injury disconnected with contract (*m*) (not being for replevin, slander, libel, malicious prosecution, seduction, or criminal conversation), a sum not exceeding five pounds, the plaintiff in any such action shall not be entitled to any costs, unless at the trial of such cause the Judge shall certify on the back of such record (*n*), either that the case was one which could not have been tried in the Civil Bill Court, or that, although within the jurisdiction of the Civil Bill Court, it nevertheless was a fit case to be tried in one of such superior Courts (*o*), or (in case there shall be no trial (*p*)) unless the Court or a Judge shall on motion make an order to the like effect; and in case there shall be no such certificate or order it shall not be necessary to enter any suggestion on the record to deprive such plaintiff of costs (*q*).

Statutory
limitation of
the amount
of costs.

In addition to the provisions of the above section, sections 126 and 243 of the C. L. P. Act, 1853 (*ante*, pp. 142, 255), limit the costs of a plaintiff in the manner thereby provided. As to the application of the section to the costs of an action referred to arbitration, see *ante*, p. 297.

The provisions of the above section and of section 243 of the C. L. P. Act, 1853, apply to actions brought under the Summary Procedure on Bill of Exchange Act (*Copland v. Armstrong*, 13 Ir. C. L. R. Ap. 46).

Residence.

(i) The object of the present section is to deprive a plaintiff of costs, who unnecessarily sues in a superior Court, when he might have proceeded against the defendant in the Civil Bill Court within the jurisdiction of which he himself resides; and accordingly the word "reside" employed above is to be construed with reference to section 69 of the Civil Bill Act, 14 & 15 Vict. c. 57 (*Butler v. Corcoran*, 7 Ir. C. L. R. 276). That section provides that if any person shall have and occupy any house, warehouse, counting house, shop, factory, or office for the sale of goods, or for carrying on any business in any county, he shall be deemed to have a residence within such county for the purposes of the Act. Where the plaintiff in an action of contract in which he had recovered a sum under £20, had an office within the civil bill jurisdiction where the defendant resided, but the plaintiff's dwelling house, where he resided with his family, was in another civil bill jurisdiction, it was held that the plaintiff was not entitled to costs (*Darcy v. Hastings*, 10 Ir. C. L. R. Ap. 24). A railway company is to be considered as having a residence wherever it has a ticket office (*M'Mahon v. Irish North Western Railway Co.*, 19 W. R. 212; *Evans v. The Great Southern & Western Railway Co.*, 5 Ir. Jur. O. S. 329); with which case compare *Adams v. The Great Western Railway Co.*, 6 H. & N. 404. The "registered Dublin residence" of an attorney has been held not to be a residence within the meaning of the present section (*Tudor v. Lawson*, 15 Ir. C. L. R. 144); and

where the plaintiff was in the habit of residing for three or four months in the year in the county of Cork and lived for the rest of the year in Dublin it was held that he was not to be considered as having a residence in Cork (*Dawson v. Coleman*, 15 Ir. C. L. R. 508); and see *Moffatt v. M'Tiernan*, 6 Ir. Jur. O. S. 177. When a plaintiff has a residence in a particular place he cannot by a temporary removal deprive the defendant of the protection of the above section (*Clarke v. Bond*, 6 Ir. Jur. O. S. 56); and if the residence of the parties is misstated in the writ, the misstatement, where it is calculated to prejudice the defendant, will be ordered to be amended at the plaintiff's cost (*ante*, p. 7); and an order will be made even where the action is brought under the Summary Procedure on Bills of Exchange Act (*Silk v. Armstrong*, Ir. R. 2 C. L. 155).

(j) By the words "cause of action" employed above, the entire cause of action is signified; and in order therefore that a plaintiff may be deprived of costs under the section, it is necessary that the entire cause of action should have arisen in the same county in which the parties reside. Where, therefore, an action was brought for a malicious arrest under a Judge's *fiat*, and it appeared that the arrest took place in Kerry, and that the affidavit on which the *fiat* was obtained was sworn in the same county, but the *fiat* was obtained in Dublin, it was held that the cause of action could not be considered as having exclusively arisen in Kerry (*Hurley v. Lawlor*, 6 Ir. Jur. O. S. 344). Compare with this case the several cases illustrating what is meant by the words "cause of action" in sect. 34 of the Common Law Procedure Act, 1853, referred to, *ante*, p. 30. As mentioned above, it is moreover necessary, in order that the plaintiff may be deprived of costs under this section, that the cause of action should have arisen in the same civil bill jurisdiction in which the parties reside. Even, therefore, where the parties reside within the same civil bill jurisdiction, yet if the contract in respect of which the action is brought, was entered into (*Crowder v. Irish North Western Railway Co.*, Ir. R. 4 C. L. 371), or was to have been performed (*Enright v. Kavanagh*, 15 Ir. C. L. R. 142), in a different civil bill jurisdiction from that in which the parties reside, the plaintiff will not be deprived of costs under the above section.

(k) The provisions of the present section are not confined to actions in the strict sense of the word, but apply equally to proceedings against a garnishee under sect. 66 of the present Act (*Waldron v. Perrott*, 9 Ir. C. L. R. 175). If, however, in such a case the order giving liberty to issue the writ reserves the question of costs, they are in the discretion of the Court (*id.*).

(l) The provisions of the present section do not apply to cases where the plaintiff recovers a sum exceeding £5, or of £20, or upwards, as the case may be, by means of the action, even though part of the sum may not have been recovered by the judgment in the action. Where, therefore a sum was tendered to the plaintiff before action which she refused to accept, and which was afterwards brought into Court upon a defence of tender, and the plaintiff recovered over and above the sum lodged, a sum less than £20, but which with the sum lodged exceeded £20, it was held that she was entitled to full costs (*O'Rorke v. M'Donnell*, 13 Ir. C. L. R. Ap. 8). The result is the same when the defendant pays a sum of money into Court under sect. 75 of the C. L. P. Act, 1853, *ante*, p. 71 (*Hughes v. Guinness*, 4 Ir. C. L. R. 314); but where the defendant paid a sum of money into the Court of Bankruptcy, upon a trader debtor summons having been issued, after which the action was brought, it was held that the money so paid in could not be considered

Cause of action.

Apply to garnishee proceedings.

"Recover."

as having been recovered in the action (*Jacob v. Bernal*, 8 Ir. Jur. N. S. 183).

Joinder of
causes of
action.

Some difficulty has arisen in applying the above section to cases where several causes of action are joined in the same summons and plaint. In *Devine v. London & N. W. R. Co.*, 17 Ir. C. L. R. 174, the plaint contained two counts in contract for non-delivery; also counts for trover and detinue. The defendants traversed the contracts alleged in the first two counts, and paid £14 2s. 6d. into Court on the other two. Issue having been taken, the jury found for the plaintiff upon one of the counts in contract, with £14 5s. damages, and for the defendants upon the issue as to the sufficiency of the sum paid in; and the taxing-master having allowed only half costs, the Court of Queen's Bench were equally divided in opinion as to whether the plaintiff was to be considered as having recovered £20, or upwards, within sect. 243 of the C. L. P. Act, 1853; and see further, *Walsh v. Walsh*, 17 Ir. C. L. R. 195. In *Arkins v. Armstrong*, Ir. R. 3 C. L. 373, it was held that where a plaintiff has recovered £8 by verdict on certain counts in contract, and the defendant has paid into Court £12. in satisfaction of the cause of action stated in another count in contract of the same count, which sum has been found to be sufficient, the plaintiff is entitled to full costs.

"Discon-
nected with
contract."

(m) As a general rule a plaintiff cannot by shaping his action in tort, as for instance by founding his claim on a breach of duty, when he might have sued in contract, evade the provisions of the present section. Thus an action against a common carrier for a loss of goods, founded on his common law duty, is not an action for a "wrong disconnected with contract," and the plaintiff will not be entitled to full costs, unless he recovers £20 or upwards (*Kerr v. The Midland G. W. Railway Co.*, 10 Ir. C. L. R. Ap. 45; *O'Sullivan v. Dublin W. & W. Railway Co.*, Ir. R. 2 C. L. 124; *Hearns v. The Lancashire & Yorkshire Railway Co.*, 7 Ir. Jur. N. S. 378). So also an action brought by a client against an attorney for negligence, the summons and plaint averring a retainer, is not an action for a "wrong disconnected with contract" (*Quan v. Frazer*, 16 Ir. C. L. R. Ap. 13).

What certifi-
cates neces-
sary.

(n) Where there has been a trial (as to which see the next note), and the plaintiff does not recover an amount sufficient to carry costs under the above section, he must, if residing in the same civil bill jurisdiction as the defendant, obtain a certificate from the Judge to the effect above stated. In case he does obtain such a certificate, the case will still be within sect. 243 of the C. L. P. A. 1853, *ante*, p. 254 (*Manning v. Chadwick*, 9 Ir. C. L. R. Ap. 32); and unless he obtains a certificate in the form there prescribed, he will be entitled to half costs only. Furthermore if the action be for assault and battery, trespass on lands, or libel, and less than forty shillings be recovered, the plaintiff will not be entitled to more costs than damages, unless he obtains the certificates prescribed respectively by sect. 126 of the C. L. P. Act, 1853, *ante*, p. 142, and 31 & 32 Vict. ch. 69, *post*, in the Appendix, p. clxvi; and where the action is for slander, and less than forty shillings is recovered, the Judge has no power to certify so as to entitle the plaintiff to any greater costs than damages, *ante*, p. 142. It will thus be seen that in *all* cases falling within the above section *two* certificates are necessary to carry full costs, and in some cases *three* certificates must be obtained.

The certificate should be given at the trial. The Judge may, however, take a reasonable time to consider the application, and he is not bound to give it instantly at the close of the trial, nor before the adjournment of the

Court (*Thompson v. Gibson*, 8 M. & W. 281). He is not even, it would appear, bound to give it on the same day (*Page v. Pearce*, *ib.* 677, 679, *per* Lord Abinger); and the defendant may by consent or acquiescence waive his right to object to the certificate being given after the lapse of an interval (*Heden v. The Atlantic Steam Navigation Co.*, 2 E. & E. 671; *Jones v. Williams*, 13 M. & W. 420). But when no application for a certificate was made till ten days after, at the next assize town, and the certificate was then given, the Court set it aside as being too late (*Forsdike v. Stone*, L. R. 3 C. P. 607).

In *M'Alister v. Callan*, 8 Ir. C. L. R. Ap. 10, it was held that when by a fatality, the Judge omits at the trial to certify, the Court may supply the omission, *sed qu.* As to amending the certificate, see *Brophy v. Jones*, 8 Ir. C. L. R. 240, in which case the Judge having certified that the case was a fit one to be tried by a special jury, and having the next day amended his certificate by adding that the case was a fit one to be tried in a superior Court, the amendment was held to have been properly made.

The Court has no power to review the discretion exercised by the Judge in certifying (*Barker v. Hollier*, 8 M. & W. 513).

(o) As to the class of cases which cannot be tried in the Civil Bill Court, see 14 & 15 Vict. ch. 57, sects. 35, 96, and see as to when a question of title would be considered as arising, *Lyons v. M'Donnell*, 7 Ir. Jur. N. S. 380. In that case the plaintiff recovered £5 for a trespass upon premises previously recovered in an action of ejectment between the same parties. The judgment in ejectment failed to describe the premises more minutely than as being "part of a house, part of a shop," &c.; and it was held that the action of trespass was one which could not have been tried in the Civil Bill Court.

Cases triable in Civil Bill Court.

As to what is a fit case to be tried in a superior Court, the question is one depending upon the particular circumstances of each case. Where an action was brought for deepening the bed of a stream, it was held to be a proper case for a certificate (*Bennett v. Scott*, 13 Ir. C. L. R. 467). Where there was no misconduct on the plaintiff's part, and he might reasonably have expected a verdict exceeding the amount above mentioned, a certificate was granted (*Hind v. Williams*, 4 Ir. Jur. O. S. 59).

Fit case to be tried in superior Court.

(p) Where a cause was referred by consent, after the jury were sworn, to three arbitrators, who several months afterwards found for the plaintiff with 50s. damages, it was held by the Court of Common Pleas (*Christian, J., dissentiente*), that there had been no trial within the meaning of the above section, and that the Court, accordingly, had power to make an order as above provided (*Bennett v. Scott*, 8 Ir. Jur. N. S. 206).

Where no trial.

(q) In cases where a certificate or order is given as above provided, the certificate or order (except in such cases as *Forsdike v. Stone*, referred to above), is final, and the decision of the Judge or Court cannot be reviewed. Where, therefore, after the Court had made an order entitling the plaintiff to costs, the defendant caused to be inserted upon the judgment roll a statement setting forth the order, for the purpose of taking proceedings in error, the statement so inserted was ordered to be expunged (*Bennett v. Scott*, 8 Ir. Jur. N. S. 394); and the defendant having afterwards instituted proceedings alleging error in fact, it was held that the decision of the Court could not be reviewed (*Scott v. Bennett*, Ir. R. 3 C. L. 217).

Decision of Judge or order of Court cannot be reviewed.

98. The enactments contained in sections 14, 22, and 90 of this Act shall apply and extend to every Court of Civil Judi-

Certain sections of this Act to apply to every civil Court in Ireland.

cedure in *Ireland*, and the enactments contained in sections 23, 24, 25, 26, 27, 28, 29, 30, 34, 35, 36, and 92 shall apply and extend to all Courts of judicature, as well criminal as all others, and to all persons having by law or by consent of parties authority to hear, receive, and examine evidence.

Master may proceed under sections 98 and 101 of 16 & 17 Vict. c. 113, without order of Court.

99. In all cases within sections 98 and 101 of the Common Law Procedure Amendment Act (*Ireland*), 1853, it shall not be necessary to obtain any direction of the Court or a Judge that the amount for which final judgment shall be marked shall be ascertained by the Master, but it shall be lawful for the Master without any such direction to ascertain such amount, and the proceedings for that purpose shall be in all respects as if a direction to the Master by the Court or a Judge had in pursuance of the said sections been made; and it shall be lawful for the Court or a Judge in any case in which the venue shall be laid elsewhere than in the county or county of the city of *Dublin*, instead of a writ of inquiry to the sheriff to ascertain the amount of damages, to direct that the amount for which final judgment shall be marked shall be ascertained by the Master, and thereupon such proceedings shall be had as if the case had been within section 101 of the Common Law Procedure Amendment Act (*Ireland*), 1853, and a direction to the Master under the said section had been obtained, provided that the jury shall be a jury of the county of the city of *Dublin*, and shall be summoned accordingly (r).

Court may direct Master to hold inquiries when venue not in *Dublin*.

(r) See *ante*, pp. 105, 108.

Provision in case plaintiff in replevin shall delay to file the summons and plead and proceed to trial.

100. In case the plaintiff in replevin shall neglect to file the summons and plead, or copy thereof, within ten days after service, unless the time shall have been extended, or to proceed to trial within one term from that in which or the vacation of which the defence or other subsequent proceeding is filed, the defendant may proceed to enter such rules as are in sections 38 and 106 of the Common Law Procedure Amendment Act (*Ireland*), 1853, in cases of such default respectively provided (s).

(s) See *ante*, pp. 235, 238.

101. In all actions for a replevin of a distress made for rent when the amount of rent in arrear at the time of making such

distress shall have been ascertained as provided by section 230 of the Common Law Procedure Amendment Act (*Ireland*), 1853, the defendant shall have judgment and execution to recover against the plaintiff the arrears of rent, whether the value of the goods and chattels distrained shall amount to so much or not, anything in the said Act to the contrary notwithstanding (t).

Judgment in replevin for amount of arrears.

(t) See *ante*, p. 238.

102. In all cases where money shall have been lodged in Court in lieu of security for costs, and the party lodging shall become entitled to be repaid the said money or any part thereof, such party may, without any rule or order for that purpose, apply to the Master of the Court to draw on the Bank of *Ireland* in favour of such party or his attorney upon record for such money or such part thereof, and the said Master, on being satisfied by affidavit or otherwise that the party applying is so entitled to be repaid, shall thereupon draw accordingly (u).

Master may draw for money lodged as security for costs.

(u) The above section provides for cases where the party lodging the money becomes entitled to be repaid it. When the opposite party becomes entitled to be paid his costs out of money so lodged, it is necessary to apply to the Court for an order. Before applying a consent should be tendered so as to save the expense of a motion upon notice.

Payment of costs out of money lodged.

When the plaintiff had lodged a sum of money in Court as security for the costs of the action, and the defendant afterwards became bankrupt, the Court allowed the plaintiff to draw out the money so lodged (*Smith v. O'Connell*, 5 Ir. C. L. R. 444). The costs to which a defendant is entitled under section 105 of the C. L. P. Act, 1853 (*ante*, p. 113), by reason of the plaintiff's default in not going to trial, will not, pending the cause, be made payable out of money lodged in lieu of security for costs (*Tupper v. Dawson*, 7 Ir. Jur. N. S. 325).

103. The provisions of this Act shall come into operation on the first day of October in the year of our Lord one thousand eight hundred and fifty-six.

Commencement of Act.

THE
COMMON LAW PROCEDURE AMENDMENT ACT
(IRELAND), 1870.

33 & 34 VICT. CAP. 109.

*An Act to abolish certain Real Actions in the Superior Courts of
Common Law in Ireland, and further to amend the Proce-
dure in the said Courts ; and for other purposes.*

[10th August, 1870.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows ; (that is to say,)

Commence-
ment of Act.

1. This Act shall commence and take effect on the second day of November, one thousand eight hundred and seventy (a).

(a) In *Nolan v. Morgan*, Ir. R. 4 C. L. 603, it was held that the Act was so far retrospective that an action commenced before the 2nd November, 1870, might be referred after the Act came into operation.

Limitation of
Act.

2. This Act shall apply to Ireland only.

Short title.

3. This Act may be cited for all purposes as "The Common Law Procedure Amendment Act, Ireland, 1870."

4. No writ of right of dower, or writ of dower under nihil habet, and no plaint for freebench or dower in the nature of any such writ, and no Quare impedit, shall be brought after the commencement of this Act, in any Court whatsoever; but where any such writ, action, or plaint would now lie, either in a superior or any other Court, an action may be commenced by "writ of summons and plaint," issuing out of the superior Courts of Common Law at Dublin, in the same manner as the writ of summons and plaint in an ordinary action, and in such form as the Judge of the said Courts respectively shall from time to time think fit to order (b).

Dower.
Writ of right of dower and *quare impedit* abolished as real actions, and to be commenced by writ of summons and plaint.

The service of the writ, appearance of the defendant, proceedings in default of appearance, pleadings, judgment, execution, and all other proceedings and costs upon such writ, shall be subject to the rules and practice which the Judges of the said Courts respectively shall from time to time make and prescribe, and which rules and practice shall be the same, as nearly as may be, as the proceedings in an ordinary action commenced by writ of summons and plaint.

Writ and all proceedings thereon to be same as in ordinary action.

In order to enable the said superior Courts and the Judges thereof respectively to make rules and regulations, and to frame writs of summons and plaint, and proceedings for the purpose of giving effect to the provisions of this section, the two hundred and thirty-third and two hundred and fortieth sections of "The Common Law Procedure Amendment Act (Ireland), 1853," shall be incorporated with this section, as if those provisions had been severally herein repeated.

Rules and regulations may be made and writs and proceedings framed for the purposes of this section.

(b) By General Order, dated 25th April, 1871, it is provided:—

1. The writ of summons and plaint in an action of dower shall be in the form following, or as near thereto as may be:—

A. B., of	Widow,	} Court of Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith, and so forth, to the said C. D., Greeting.
C. D., of	Plaintiff ;	
County of	Defendant.	

Form of plaint.

C. D., the defendant, is summoned to answer the complaint of A. B., who complains that A. B. was the lawful wife of E. B. since deceased. That the said E. B. was seised of such an estate in the lands of [specifying the lands] in the County of _____, as entitled the said A. B. to dower out of the said lands.

And the plaintiff prays judgment against the said C. D. to recover one-third of the said lands, with £ _____ damages for the detention of her dower, and costs of suit.

Therefore, &c.

2. The service of the said writ, the defence, judgment, execution, and all subsequent proceedings and costs shall be subject to the same general rules and practice as the proceedings in an ordinary action.

In certain cases Judge of superior Courts may order cause to be tried in Civil Bill Court.

5. Where in any action of contract brought or commenced in any of the superior Courts of Common Law at Dublin the claim endorsed on the summons and plaint does not exceed forty pounds (c), or where such claim, though it originally exceeded forty pounds, is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding forty pounds (d), it shall be lawful for the defendant in the action, within eight days from the day upon which the summons and plaint shall have been served upon him (e), if the whole or part of the demand of the plaintiff be contested (f), to apply to the Court in which the action is brought, or to any Judge of the said superior Courts in chamber, for an order that such action should be tried in the civil bill court or one of the civil bill courts in which the action might have been commenced (g), and on the hearing of such application the judge shall, on proof that sufficient notice (h) thereof has been given to the plaintiff or his attorney, unless there be good cause to the contrary (i), order such action to be tried in such civil bill court at the sessions to be named in such order, and thereupon the plaintiff shall lodge the original summons and plaint, which, if filed, shall be taken off the file for that purpose, and delivered to the plaintiff, and the order with the clerk of the peace of the county mentioned in the order, and the cause and all proceedings therein shall be heard and taken in such civil bill court as if the action had been originally commenced in such court (j); and the costs of the parties in respect of proceedings subsequent to the order of the Judge of the superior court shall be allowed according to the scale of costs in use in the civil bill courts, and the costs of the proceedings previously had in the superior court shall be allowed according to the scale in use in such latter court (j).

Where unliquidated damages claimed.

(c) Properly speaking, no claim is endorsed on the summons and plaint except in cases where the claim is for a liquidated or money demand (*ante*, p. 9); and it has been therefore argued that the Court has no jurisdiction to remit an action of contract not brought on foot of such a demand. The Court has, however, jurisdiction in such a case to make an order remitting the cause (*Guy v. Hinde*, Ir. R. 5 C. L. 247).

Joinder of causes of action.

(d) When two or more causes of action are joined in the same summons and plaint so as to combine counts in contract and in tort, or so as to make the sum claimed exceed £40 in actions of contract, some doubt seems to exist

as to the power of the Court to remit. In ordinary cases the Court may direct separate records to be made up, where it is inexpedient that different causes of action should be tried together (*ante*, p. 52); and it will probably be held that where causes of action are joined for the purpose of endeavouring to oust the jurisdiction of the Court under the present Statute, a similar course may be adopted: see *Norton v. Lawrence*, 5 Ir. L. T. 94.

(e) Two principles of great importance have been established as regards the computation of the time within which application may be made for an order under this and the following section. In the first place, it has been held that the present Act is to be treated as so far incorporated with the C. L. P.

Within what time application to be made.

Parsons v. Fegan.

Mr. Boughey applied that the action in this case should be remitted to the Recorder's Court unless the plaintiff gave security for the costs. The summons and plaint was for recovery of certain deeds and documents, and for detinue for detaining the same.

Mr. Buchanan opposed the application, on the grounds that the Real Actions Act gave no power to the court to refer any action in which the summons and plaint contained a count for detinue. His Lordship refused the motion, with costs.

ies, and therefore the days which in notices or other proceedings days within which application is R. 4 C. L. 603; *M'Donough v.* the long vacation are not among and are therefore to be reckoned other held that the application tice, and not the hearing of the *ubi supra*; and it is therefore ny of the eight days (exclusive in which the summons and plaint

(f) The Court must be satisfied that the whole or part of plaintiff's demand is *bonâ fide* contested, and the defendant's affidavit will not necessarily be conclusive upon the point (*Devlin v. Flaherty*, Ir. R. 5 C. L. 137).

Must be *bonâ fide* contest.

(g) As to the Civil Bill Court in which the action might have been originally commenced reference should be had to sect. 69 of the Civil Bill Act 1851 (14 & 15 Vict. c. 57), which provides that if any person shall have and occupy any house, warehouse, counting house, shop, factory, or office for the sale of goods or for carrying on any business in any county, he shall be deemed to have a residence within such county for the purposes of the Act. See as to the construction of this section, *ante*, p. 362.

To what Civil Bill Court cause may be remitted.

(h) Sufficient notice has been held to mean such notice as the Court shall consider sufficient under the circumstances, and need not be two clear days (*M'Donough v. Brophy*, Ir. R. 4 C. L. 485).

Sufficient notice.

(i) Before considering whether a cause is to be remitted to the Civil Bill Court, the Court must be satisfied that a *bonâ fide* contest exists between the parties as to the existence or amount of the claim, note (f), *supra*. If a *bonâ fide* contest does exist, the onus lies on the plaintiff of showing why the cause should be tried in a superior Court. Where the plaintiff and his witnesses resided in England, and the expense of bringing them to the Civil Bill Court would exceed the sum of £5 each, being the limit of the sum which the Civil Bill Court has the power of awarding for the expenses of a witness under 27 & 28 Vict. c. 99, s. 52, the Court refused to remit (*Service v. Kennedy*, 19 W. R. 287); and where the plaintiff was a merchant residing in London, and the defendant a trader residing in Donegal, an application under the above section was likewise refused (*Hall v. Miller*, 5 Ir. L. T. 28). Where the action is brought under the Summary Procedure on Bill of Exchange Act (Ireland), 1861, the defendant should obtain leave to appear and defend before applying to have the cause remitted (*Kinsella v. Murphy*, Ir. R. 5 C. L. 71); and see further as to when a case is such as to be fit to be tried in the superior Court, note (o) to next section.

Good cause against remitting cause.

Power to
amend.

(j) As to the power of the Chairman to amend defects and errors in the proceedings, see *Thomas v. Purcell*, 22 L. T. N. S. 474.

Taxation of
costs.

(jj) When a cause is remitted, the Judge of the inferior Court has jurisdiction over the costs of the suit for the purposes of taxation, both as regards the costs incurred before and after the making of the order of reference (*Moody v. Steward*, 19 W. R. 161).

Actions for
malicious
prosecution,
&c. brought
in superior
Courts may
be remitted
to Civil Bill
Court by
Judge.

6. Any person against whom an action for malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other action of tort may be brought in any of the superior Courts of Common Law at Dublin, may, within eight days from the day upon which the summons and plaint shall have been served upon him(*k*), apply to the Court in which the action is brought, or to any Judge of the said superior Courts in chamber (having previously made and filed in the proper office an affidavit (*l*) setting forth that the plaintiff has no visible means (*m*) of paying the costs of the defendant should a verdict not be found for the plaintiff), for an order that unless the plaintiff shall, within a time to be therein mentioned, give full security for the defendant's costs to the satisfaction of the Master of the said Court, (*n*), or satisfy the Judge that he has a cause of action fit to be prosecuted in the superior Court (*o*), all proceedings in the action shall be stayed, or in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy the Judge as aforesaid, that the cause be remitted for trial in the Civil Bill Court of the division of the county in which the defendant usually resides, (*p*) at the sessions to be named in such order, and on the hearing of such application the Judge shall, on proof that sufficient notice(*q*) thereof has been given to the plaintiff or his attorney, and if he is satisfied of the truth of the statements in such affidavit, make such order accordingly; and where any such cause shall be remitted for trial in manner aforesaid the plaintiff shall lodge the original summons and plaint, which, if filed, shall be taken off the file for that purpose, and delivered to the plaintiff, and the order with the Clerk of the Peace of the county named in the order, and thereupon the said cause shall be deemed to be and shall be within the jurisdiction of the Civil Bill Court named in such order, and the said Court shall have all and the same powers and jurisdiction with respect to the said cause, as if the same had been originally within the jurisdiction of the said Court, and had been commenced by process in the said Court (*r*); and the costs of

the parties in respect of the proceedings subsequent to the order of the Judge of the superior court shall be allowed according to the scale of costs in use in the civil bill courts, and the costs of the proceedings in the superior court shall be allowed according to the scale in use in such latter court (s).

(A) See *ante*, note (e).

(l) Where an affidavit could not be made by the defendant so as to be filed in time, an affidavit made by the defendant's attorney from his instructions was allowed to be used, and the motion directed to stand over so as to allow of the defendant's affidavit being used (*Cloran v. Reilly*, 5 Ir. L. T. 43); and see as to the construction of similar provisions requiring an affidavit to be made, or other act to be done by a party, *Oxlade v. N. E. Railway Co.*, 12 C. B. N. S. 350; *Dickson v. Neath and Brecon Railway Co.*, L. R. 4 Ex. 87; *M'Kewan v. Rolt*, 4 H. & N. 738. The defendant, in his affidavit, should state all the substantial facts upon which he relies (*Norton v. Lawrence*, 5 Ir. L. T. 94).

When to
apply.
Affidavit.

(m). The expression "visible means," employed in this section, has given rise to considerable discussion as to the meaning to be attributed to it. In *Hennegan v. Jackson*, 19 W. R. 208, the plaintiff being a practising attorney, it was held he could not be considered as not having visible means of paying costs. In *Counsel v. Garvie*, Ir. R. 5 C. L. 72, it appearing that the plaintiff was a shop assistant at a salary of £100 per annum, the Court held that he had visible means of paying costs; and it is there stated that by visible means is meant property which the defendant can reach to pay his costs, in the event of his obtaining a verdict. See also *Crawford v. Doud*, 5 Ir. L. T. 4.

"Visible
means."

It should be remembered that even where the plaintiff has no visible means of paying costs, yet if the cause of action is fit to be prosecuted in a superior Court, an order to remit will not be made: note (o), *post*.

(n) The Master should fix the amount of security to be given, and satisfy himself as to the solvency of the proposed sureties (*Spence v. Duffy*, 5 Ir. L. T. 5). It will therefore be irregular to object to the solvency of the proposed sureties when the parties go before the Judge to perfect the recognizances. A reasonable time will be allowed, if asked for, for the purpose of giving security. In *Cranston v. Scott*, 19 W. R. 157, a period of three weeks was allowed.

Giving secu-
rity.

(o) No fixed rule can be considered as having been as yet established for the purpose of determining when a cause of action is fit to be prosecuted in a superior Court. The question is one for the discretion of the Court, and depends mainly upon the circumstances of each case. The fact that the cause of action is slander, and that more than £40 is claimed for damages, is not *per se* sufficient to render a case a fit one for a superior Court (*Cranston v. Scott*, Ir. R. 4 C. L. 481).

Where the action is *bond fide* brought, and questions of law are likely to arise more fit to be decided in a superior Court than before the Chairman, the case will not be remitted, even though it is probable that less than £40 will be recovered (*Reid v. Stuart*, Ir. R. 5 C. L. 68). The possibility that a larger sum than £40 will be recovered, although not conclusive, will also be taken into consideration in determining whether the cause of action is fit for the superior Court (*Kennedy v. Baxendale*, Ir. R. 5 C. L. 74).

Fit cause to
be prosecuted
in a superior
Court.

It is there laid down *per* Fitzgerald, J. (p. 81), that the plaintiff should lay before the Court or Judge circumstances sufficient to establish that his action is not a sham, frivolous, oppressive, or vexatious action, and that it has been instituted *bona fide* to enforce some real and substantial cause of action, which ought to be tried in the superior Court in preference to the inferior Court; *e. g.*, that the injury complained of is so serious that the damages may probably be large; or that the action may give rise to a difficult question of law; or a complicated state of facts; or some constitutional question; or a question on title; or may seriously involve character. See also as to when a case is to be considered fit to be tried in a superior Court, *Craven v. Smith*, L. R. 4 Ex. 146; *Taylor v. Cass*, L. R. 4 C. P. 614; *Norton v. Lawrence*, 5 Ir. L. T. 94. In all such cases it should be remembered that the onus lies on the plaintiff of showing that the case is a fit one for the superior Court. Where on a motion to remit, it appeared that a serious question of law as to the duty of the defendants to keep a certain street in repair, free from obstruction, and properly lighted, would arise, the Court, nevertheless, made an order remitting the cause, on the defendants undertaking to admit their duty, and so preclude the question of law from being raised (*Casey v. The Mayor, &c., of Dublin*, Ir. R. 5 C. L. 227).

Usual
residence.

(*p*) The "usual" residence spoken of above means residence as defined by the Civil Bill Act (*Kennedy v. Bazendale*, Ir. R. 5 C. L. 74); and by sec. 69 of that Act a person is to be considered as residing in any county where he has and occupies any house, warehouse, counting-house, shop, factory, or office for the sale of goods, or for carrying on any business. Consequently, although the defendant usually resides in England, yet if he has an office for carrying on business in Ireland, the Court has jurisdiction to remit (*Kennedy v. Bazendale*, *ubi supra*). For the purpose of residence within the meaning of the Act referred to, a railway company is to be considered as residing at every place where it has a ticket office along its line (*M'Mahon v. Irish N. W. Railway Co.*, 19 W. R. 212), and see further *ante*, p. 362. The Court has jurisdiction under this section to remit the cause only to the county where the defendant resides, and the consent of the parties cannot enable the Court to remit it elsewhere (*Ready v. Odum*, 19 W. R. 135).

Jurisdiction
of chairman.

(*q*) See note (*h*), *supra*.

(*r*) As to the amount of damages which the Chairman may award when a cause has been remitted to him, see *Kennedy v. Bazendale*, Ir. R. 5 C. L. 74, where, however, the question was left undecided.

(*s*) See note (*j*), *supra*.

APPENDIX.

PART I.

CONSISTING OF THE GENERAL ORDERS OF THE SUPERIOR COURTS
OF COMMON LAW.

GENERAL ORDERS IN THE QUEEN'S BENCH, COMMON PLEAS, EXCHEQUER OF PLEAS, AND EXCHEQUER CHAMBER.

Dated 11th day of January, 1854.

IN pursuance of a statute passed in the session of Parliament holden in the 16th and 17th years of the reign of Queen Victoria, entitled "An Act to amend the Procedure in the Superior Courts of Common Law in Ireland," and of all other statutes and powers in that behalf—

IT IS ORDERED,

I.

That the following shall be the General Orders of the Courts of Queen's Bench, Common Pleas, Exchequer of Pleas, and Exchequer Chamber; and that all other General Orders of the said Courts, or any of them, shall be considered to be abolished, save and except as regards any step or proceeding heretofore taken, and save as hereinafter provided. That all former Orders which are hereinafter simply repeated, shall continue to operate as if the same had not been disturbed; and that all variations of former orders, and all new orders shall take effect from the date of these rules, as to all actions thereafter to be commenced, and also as to actions then depending, so far as the same may be applicable thereto; and where the same shall not be so applicable, the general orders hitherto in force shall be deemed to be subsisting, and shall apply to such actions: provided, nevertheless, that nothing contained in this order or the following orders shall apply to or affect the orders of the Court of Queen's Bench

Former general orders abolished, except those specially saved.

at the crown side, or actions of *Quare Impedit* therein ; the orders of the Court of Common Pleas in relation to fines and recoveries, or in relation to the statute passed in the 4th and 5th years of the reign of his late majesty King William the iv., entitled " An Act for the abolition of Fines and Recoveries, and for the substitution of more simple modes of Assurance in Ireland," or actions of *Quare Impedit* therein ; or the orders of the Court of Exchequer at the revenue side thereof.

AND IT IS FURTHER ORDERED,

II.

Glossary.

That whenever any word is used in any of the following General Orders, importing the singular number, or the masculine gender only, the same shall apply to several persons as well as one person, and to bodies corporate as well as to individuals, and to females as well as males ; and the word " Judge " shall be taken to mean also " Baron ; " and the word " County " shall include (when necessary and consistent) any county of a city or county of a town or city, or county of a place, or city and county as the case may be ; and the word " Court " shall apply to a Judge or Baron sitting alone or in chamber, as well as to the full Court ; and the word " Party " or " Person " shall extend to and include any corporation or other public body ; and whenever the entry of a side-bar rule, " as of course " is authorized, it shall be understood that such rule may be entered without the production of any affidavit or other document to the officer ; and the word " Affidavit " shall include an affirmation or declaration made by any person who is empowered to give evidence by affirmation or declaration in lieu of oath ; and none of the following rules requiring the affidavit of, or any act to be done by the attorney, or the signature of attorney or counsel, or service on the attorney, shall apply to cases where plaintiff or defendant shall sue or defend in person ; but all such acts shall be done by, and notices given to the party so suing or defending in person.

COURSE OF BUSINESS OF THE COURTS.

Motions for prohibitions, &c., may be made during sitting of Court.

Order of precedence at the bar.

3. Motions for prohibitions or attachments, or for any relief or order against a sheriff or against an attorney, grounded on the jurisdiction of the Court over them as officers, may be made on any day during the sitting of the Courts.

4. On the last day of term only, members of the bar shall take precedence according to juniority, without prejudice to the Attorney or Solicitor-General, moving officially in Her Majesty's causes, at any time they may seem convenient.

5. The days for the admission of attorneys shall be the first and last days of the term, and every Monday in term.

Days for admission of attorneys.

COMPUTATION OF TIME.

6. When, by any rule, order, or proceeding, time is to be computed by days, it shall be inclusive or exclusive of the holidays under the Common Law Procedure Amendment Act (Ireland), 1853, as is by that statute directed; and when by the month, it shall be considered a calendar month; and when by the year, twelve calendar months; and in all cases it shall be exclusive of the first and inclusive of the last day, unless the last be a holiday under the Common Law Procedure Amendment Act (Ireland), 1853, when the following day shall be included.

Mode of computing time. See Reg. Gen., H. T., 1853, r. 174.

The holidays to be observed and kept in the Superior Courts are prescribed by section 232 of the C. L. P. Act, 1853; by which section it is also directed that the days in question are not to be reckoned or included in any notices or other proceedings except notices of trial and inquiry, and that Sundays are not to be reckoned or included in any notice or proceeding whatsoever. It is also provided by that section that when the last day included in any such notice of trial or inquiry shall happen to be a holiday, the next day which is not a holiday is to be considered as the last of the days in such notice.

Holidays.

The above order provides, as will be seen, that in all cases of computation of time it is to be reckoned exclusive of the first and inclusive of the last day—unless when the last is a holiday. It must, however, be remembered that when the time for the doing of an act is fixed by statute, it cannot be either enlarged or shortened by a general order. (*Flower v. Bright*, 2 Johns & H., 590; *Evans v. Jones*, 2 B. & S. 45; *O'Meara v. Foley*, Ir. R. 4 C. L. 116).

How time reckoned.

When a question as to the computation of time arises, the chief difficulty generally lies in determining whether the time is to be reckoned exclusive or inclusive of the days upon which the events fixed as the *termini*, between which the time is to be reckoned, happen. When the words "clear days" are used, no difficulty arises, as in that case both of the days in question must be excluded; and when a proceeding is to be taken a certain number of days "at least" before the happening of an event, the days are to be reckoned as clear days. (*The Queen v. The Justices of Shropshire*, 8 A. and E. 173; *Young v. Higgon*, 8 Dowl. 212; *Woolrych on Legal Time*, p. 150).

Exclusive or inclusive.

"Clear days."

"At least."

Where a statute required a certain notice to be inserted in the *Gazette* not less than fourteen days before an election, it was held that the days were clear days (*The Queen v. Lauder*, Ir. R. 1 C. L. 225). On the other hand when a certain number of "days' notice" is required to be given—as for instance, ten days notice of trial, time is to be reckoned exclusive of the first, but inclusive of the last of the days (see p. 111).

"Not less."

"Days' notice."

When a proceeding, such, for instance, as the filing of a defence, is required to be taken *within* a certain time from a particular date, the day from which the time runs is to be excluded from the computation of time,

"Within."

and the party has the entire of the last day of the time fixed for the doing of the act, but not the day after (see *Boyd v. Nethery*, 10 Ir. C. L. R. 369, referred to at p. 41). The word "within" is sometimes used for the purpose of prescribing a period of time which must elapse between the events, as for instance in the 207th section of the C. L. P. Act, 1853, which provides that in certain events judgment may be marked and execution issued within fourteen days after verdict. In such cases the days are clear days, and are to be reckoned exclusive of both the days on which the events in question occur (*O'Meara v. Foley*, Ir. R. 4 C. L. 116; *The Queen v. Sweeney*, 2 Ir. L. R. 278).

As a general rule, when a party has a certain time given him for the doing of an act, time is to be reckoned exclusive of the day on which the event which fixes the commencement of the term happens (*O'Meara v. Foley*, *ubi supra*, *Young v. Higgon*, 8 Dowl. 212). In *Connolly v. Bremner*, L. R. 1 C. P. 557, where a day's time to plead was given to the Defendant from the return of a cheque, it was held he had the entire of the subsequent day for the purpose.

Where an order was made that the Plaintiff should be at liberty to mark judgment three days *after* service of the order, it was held that the days were clear days (*Weeks v. Wray*, 9 B. and S. 62). When a certain period of time *from* a particular date is prescribed for any purpose, no general rule can be laid down as to whether the day of the date is to be excluded from the computation of the term, as it depends upon the reason of the thing according to the circumstances (*Lester v. Carland*, 15 Ves. 248). In the case of leases where the term is for so many years from a particular date, the day of date is in general to be excluded. (*Ackland v. Lutley*, 9 A. & E. 879; *Woolrych on Legal Time*, p. 143). So also where a letter of licence was given for twelve months *from* a particular day, it was held that the day in question was not to be included in the computation of the term (*Ammarman v. Digges*, 12 Ir. C. L. R. Ap. 1). On the other hand, although it is provided by section 28 of the C. L. P. Act, 1853, that a writ may be renewed for six months from the date of renewal, the day of renewal is to be included in such term (*Anon* 1 H. & C. 664); and possibly on the principle that judicial acts are to be considered as taking place at the earliest moment of the day on which they are done (*Wright v. Mills*, 28 L. J. Ex. 223), the day upon which they take place is in such cases to be included in the computation of time.

When a party has *until* a certain day to do some act, he is entitled to the entire of that day for the purpose of doing it (*Kerr v. Jeston*, 1 Dowl. N. S. 538), but when execution is respite until a certain day, it may be issued upon that day (*Rogers v. Davis*, 8 Ir. L. R. 399). The rule in such cases is that the party who is to do the act has the day in question for doing it. Where goods were insured *from* the 14th February *until* the 14th August, it was held that they were protected during the entire of the latter day (*Isaacs v. Royal Insurance Co.*, L. R. 5 Ex. 296).

When the last day included in a particular period of time is a holiday, it is to be excluded from the computation of time, in case the period is prescribed by any of the C. L. P. Acts, and is reckoned by days, but where the time is reckoned by weeks or months, the time cannot be extended to the next day (*Rouberry v. Morgan*, 9 Ex. 730; *Flower v. Bright*, 2 Johns & H. 590). Where, however, the period of time is prescribed by the general orders, the time will, under such circumstances, be ex-

"After."

"From."

"Until."

Excluding days.

Extending time.

tended. The fact that the offices of the court are closed upon the last day fixed for the doing of the act, is no reason for extending the time (*Evans v. Jones*, 2 B. & S. 45), unless the offices are closed throughout the entire period (*Mayer v. Harding*, L. R. 2 Q. B. 410), and therefore the days between the 1st August and 20th October are to be included in the period of six months fixed by section 37 of the C. L. P. Act, 1853. (*Mullin v. Bonjor*, 5 Ir. C. L. R. 475). If, however, a party is prevented from taking a proceeding upon the last day upon which it can be taken by the default of the offices, the court will allow the proceeding to be taken *nunc pro tunc* (*Evans v. Jones*, 2 B. & S. 45, 46). In cases not coming within the provisions of the C. L. P. Acts, or the General Orders, time cannot be extended in consequence of the last day falling upon a Sunday or Holiday (*Flower v. Bright*, *ubi supra*), unless the statute fixing the time specially provides for an extension of it, or unless in such a case as *Mayer v. Harding* referred to above.

As to excluding the holidays in the computation of time, the principles before mentioned are applicable. When the time is fixed by statute (not being one of the C. L. P. Acts), they cannot, in the absence of a special provision, be excluded (*Peacock v. The Queen*, 4 C. B. N. S. 264), unless the case be similar to *Mayer v. Harding*, referred to above. On the other hand, when the time is fixed by one of the C. L. P. Acts or by the General Orders, and is reckoned by days, they are to be excluded, and therefore in cases within the 84th G. O. which provides that a party excepting shall furnish a draft bill of exceptions, ten days before the commencement of the next succeeding term, it has been held that the holidays are to be excluded in reckoning the time (*Hassard v. Caulfield*, 7 Ir. Jur. O. S. 141; *White v. Tyrrell*, 5 Ir. C. L. R. 278).

WRIT OF SUMMONS AND PLAINT.

7. In addition to the endorsement required by the Common Law Procedure Amendment Act (Ireland) 1853, every writ of summons and plaint shall have the following memorandum endorsed thereon, before service thereof:—

Endorsement
on writ of
summons
and plaint.

“N.B. This writ is to be served within six calendar months from the date thereof, including the day of such date, and not afterwards.” [*And if the action be for a liquidated demand, add: “And if the amount within claimed, and £ for costs, be paid to the plaintiff or his attorney within six days from the service hereof, further proceedings will be stayed.”*]

See *ante*, p. 5.

8. When the sum claimed shall be paid, pursuant to such endorsement, the defendant shall be at liberty to call upon the plaintiff's attorney, by notice, for the taxation of the costs, and if more than one-sixth shall be disallowed, the plaintiff's attorney shall pay the costs of the taxation, and return to the defendant or his attorney the amount overcharged, otherwise the defendant shall pay such costs.

Attorney-to
tax costs of
summons
and plaint if
required.
See R. G., H.
T., 1853, r. 1.

AFFIDAVIT OF SERVICE.

Process-server to swear he knows defendant's person when service personal.

9. In every affidavit of personal service of the writ of summons and plaint, the process-server shall swear that he is acquainted with the person of the defendant whom he has served.

See *ante*, p. 34.

ADMISSION OF NEXT FRIEND.

Admission of next friend only an authority in particular action. R.G., H. T., 1853, r. 5.

10. A special admission of *prochein ami*, or guardian, to prosecute or defend for an infant, shall not be deemed an authority to prosecute or defend in any but the particular action or actions specified.

See *ante*, p. 46.

BAIL.

Imperfect description no ground of discharge, if due diligence used. R. G., H. T., 1853, r. 2.

11. Where the defendant is described in the *capias* or affidavit to hold to bail by initials or a wrong name, or without a christian name, the defendant shall not therefore be discharged out of custody, nor the bail-bond delivered up to be cancelled, if it shall appear to the court that due diligence had been used to obtain knowledge of the proper name.

It is proposed by a bill at present before parliament to abolish arrest both on meane and final process, except in a few special cases. It is therefore considered unnecessary to refer to any of the cases upon the subject.

Fiat to be written on affidavit to hold to bail

12. Every affidavit to hold to bail shall be laid before the judge by the attorney for the party seeking a fiat, and every such fiat shall be written or printed on the same sheet with the affidavit or one of the affidavits to ground such fiat; and in case the judge shall refuse such fiat, he shall endorse his initials thereon, with the words "no rule," and in such case such affidavit shall not be laid before another judge without apprising him of the fact of such refusal.

Notice of bail. Statements in. R. G., H. T., 1853, r. 100.

13. Every notice of bail and for security for costs shall, in addition to the description of the bail, mention the street or place and number (if any) where each of the bail resides, and all the streets or places and numbers (if any) in which each of them has been resident at any time within the preceding six months, and whether he is a housekeeper, or householder, or freeholder.

14. Notice of more bail than two shall be deemed irregular, unless by order of the Court.

Notice of more than two irregular, unless by order. R. G., H. T., 1853, r. 91.

15. In town cases two clear days', and in country cases four clear days' notice of bail shall be given, and in town cases a copy of such notice shall be lodged with the Clerk of the Rules the day before such bail shall be given, and no rule to receive bail or to confirm bail shall in any case be necessary.

What notice necessary.

16. When bail to the sheriff shall be tendered as bail to the action, the plaintiff may object to the said bail, although he may have taken an assignment of the bail-bond.

Bail to Sheriff may be objected to, as bail to the action. R. G., H. T., 1853, r. 86.

17. No practising attorney, or clerk or apprentice to a practising attorney, shall be bail for any defendant, in any case whatsoever, without the leave of the Court.

No practising attorney, &c., to be bail in action. See R. G. H. T., 1853, r. 94.

18. For the purpose of giving bail before a commissioner or judge of assize, a side-bar rule may in all cases be entered, on an affidavit of the defendant's inability to give bail in Dublin; and such bail shall be given within a week from the entry of such rule.

Rule for bail before Commissioner or Judge.

19. In all cases where bail qualify, they shall sign a bail-piece, which shall likewise be signed by the defendant's attorney.

Bail to sign bail-piece.

20. In the case of bail taken before a commissioner or judge of assize, it shall be the duty of the commissioner or judge's registrar, as the case may be, to transmit forthwith by post the bail-piece and affidavit of perfection to the master of the Court in which the action is pending, to be filed by him in the proper office.

Commissioner or registrar to transmit bail-piece.

21. The Sheriff may, in all cases, as of course, enter a side-bar rule to lodge in Court the money deposited in lieu of bail to him, pursuant to statute 43 Geo. III., c. 46, s. 2, and the defendant may, in all cases, as of course, enter a side-bar rule for liberty to lodge money in lieu of bail at bar, pursuant to statute 10 Geo. IV., c. 35.

Side-bar rule to lodge money in lieu of bail.

22. In all cases where the plaintiff or defendant shall be entitled to draw money lodged in lieu of bail, in pursuance of statutes 43 Geo. III., c. 46, and 10 Geo. IV., c. 35, or either of them, the application for that purpose shall be by motion on notice to the defendant or plaintiff, as the case may be, and to the Sheriff, and the order thereon shall be absolute in the first instance, unless the Court shall otherwise direct.

Motion to draw money lodged in lieu of bail.

Action on
bail-bond in
any court.
R. G., H. T.,
1853, r. 83.

23. An action may be brought upon the bail-bond by the Sheriff himself in any Court.

No proceed-
ings on bail-
bond pend-
ing rule to
bring in
body. R. G.,
H. T., 1853,
r. 87.

24. A plaintiff shall not be at liberty to proceed on the bail-bond, pending a rule to bring in the body of the defendant.

Bail-bond,
when it may
be put in
suit.

25. No bail-bond shall be put in suit until after the expiration of eight days, exclusive of the return day of the *capias*; and in case of several actions on the bail-bond, proceedings may be restricted to one action, on payment of costs, unless sufficient reason be shown for proceeding in more than one.

Marking
judgment,
when bail-
bond to
stand as se-
curity. R. G.,
H. T., 1853,
r. 84.

26. In all cases where the bail-bond shall be directed to stand as security, the plaintiff shall be at liberty to mark judgment on it.

Liability of
bail to ac-
tion. R. G.,
H. T., 1853,
r. 109.

27. Bail shall be only liable to the sum sworn to by the affidavit to hold to bail, and the costs of suit, not exceeding in the whole the amount of the sum for which they have qualified.

Notice of bail
before Judge.

28. Where bail is to be put in before a Judge of Assize, twenty-four hours notice thereof shall be given to the Judge's registrar; and the defendant's attorney, or some one on his behalf, shall attend the Judge with such bail.

Application
to stay pro-
ceedings on
bail-bond. R.
G., H. T.,
1853, r. 88.

29. No application shall be made to stay proceedings regularly commenced on the assignment of any bail-bond, or to set aside an attachment regularly obtained against the Sheriff for not bringing in the body, unless grounded on an affidavit of merits, if made on the part of the original defendant, or grounded on an affidavit showing that such application is really and *bona fide* made on the part of the Sheriff or bail, at his or their own expense, and for his or their indemnity only, and without collusion with the original defendant.

Render of ..
principal in
action
against bail.
R. G., H. T.,
1853, r. 108.

30. When the plaintiff shall proceed by action, or by *scire facias*, against bail to the action, the bail shall be at liberty to render their principal at any time within the time for filing of their appearance and defence in such action or *scire facias*, but not at any later period; and on such render being duly made, and notice thereof given, the proceedings shall be stayed, on payment of the costs of the process, or *scire facias*, and the service thereof

only; and they shall be at liberty to render their principal at any time during the last day for render, before the Marshalsea shall be closed for the night.

31. It shall not in any case be necessary to issue a writ of *ca. Sa.* not *capias ad satisfaciendum* before taking proceedings against bail necessary. to the action.

PLEADINGS UP TO FINAL JUDGMENT.

32. The signature of counsel shall not be necessary to any summons and plaint; but in all cases in which a summons and plaint shall be signed by counsel, and in which it shall appear to the taxing officer that same should have been settled by counsel, he shall allow such fee to counsel, not being less than ten shillings and sixpence, as from the length or difficulty of the summons and plaint, or the nature of the case, he shall think just. Signature of Counsel to plaint.

33. All pleadings subsequent to summons and plaint shall be signed by counsel; and the taxing officer shall at his discretion allow, on taxation, as against the party, such fee to counsel, not being less than one guinea, for advising and preparing such pleading, as from the length or difficulty thereof, or from the nature of the case, he may consider just. Pleadings subsequent to plaint to be signed by Counsel.

When the Defendant appears in person the defence need not be signed by counsel (*Flood v. Oldwright*, 1 Ir. Jur. N. S. 10). In other cases if not so signed it will be set aside (*Byrne v. Little*, 7 Ir. Jur. O. S. 232).

34. All writs of summons and plaint, appearances and defences, particulars of demand and set-off, and subsequent pleadings, abstracts of issues, bills of exceptions, writs of inquiry, revivor and *scire facias*, handed by the attorneys to the officer, shall be legibly engrossed or printed on parchment fifteen inches square, bookwise, and shall contain thirty-six lines, or thereabouts, on each page, leaving a margin on the left hand side of the front, and on the right hand side of the reverse, of at least two inches; and each cause of action in a summons and plaint, and each further plea of a defendant, shall be commenced in a new paragraph. Engrossment of pleadings.

See *ante*, p. 6.

35. When judgments shall be marked upon pleadings filed before the 12th of June, 1850, which are not engrossed on parchment of proper dimensions, so that same cannot be bound in the manner prescribed by the Act 13 Vic. cap. 18, a new engrossment of the same in proper form shall be prepared by the officer, and substituted on the judgment file in lieu of such original pleadings; the expenses thereof to be paid as part of the incidental expenses of the offices, pursuant to the 13 Vic. c. 18, s. 45. New engrossment of pleadings already filed.

Rule to file
summons
and plaint
against de-
fendant in
custody.

36. When a defendant shall be in actual custody of the sheriff, and a summons and plaint shall not have been served, or if served shall not have been filed in due time, the defendant may at any time within twenty days from the day of his arrest, or where the defendant shall be in actual custody of the marshal, he may at any time, on affidavit that he is in custody, and has not applied for his discharge under the Insolvent Debtors' Act, obtain a side-bar rule that the plaintiff shall file a summons and plaint against him within four days, or that he shall be discharged; and in case no summons and plaint shall be filed within the time limited, on an affidavit of the service of the rule, and a certificate of no summons and plaint filed, the defendant shall be entitled to an absolute rule for his discharge.

Rule for the
discharge of
Defendant
in custody.

37. After the expiration of six months from the service of the summons and plaint, or the arrest of defendant, whichever may first take place, unless the plaintiff shall have filed the summons and plaint, or a copy thereof, the defendant, if in actual custody, on an affidavit thereof, and a certificate of no summons and plaint filed, may obtain an absolute side-bar rule for his discharge at the plaintiff's suit.

If *certiorari*
issued,
plaintiff to
file sum-
mons and
plaint in six
months.

38. Where a cause shall be removed by *certiorari*, the plaintiff shall be deemed out of Court, unless he shall file a writ of summons and plaint within six months from the return of the *certiorari*.

Time for
filing sum-
mons and
plaint not to
be extended
but by
motion.

39. The time for filing a summons and plaint shall not in any case be extended, unless by motion for that purpose.

See *ante*, p. 35.

Amendment
of writ or
pleading to
be by
motion.

40. No amendment whatever of any writ or pleading shall be allowed, except by consent or order of the Court on motion, unless authorised by the Common Law Procedure Amendment Act (Ireland), 1853, sections 87 and 89.

See sect. 231, C. L. P. Act, 1853.

When new
plaintiff's
name added,
consent to
be filed. R.
G., H. T.,
1853, r. 6.

41. Whenever a plaintiff shall amend the writ of summons and plaint, after notice by the defendant, or a plea in abatement by reason of a non-joinder, by virtue of the Common Law Procedure Amendment Act (Ireland) 1853, sec. 87, he shall file a consent in writing of the party or parties whose name or names is or are to be added, together with an affidavit of the handwriting, and give notice thereof to the defendant, unless the filing of such consent be dispensed with by order of the Court or a judge.

See *ante*, pp. 92, 94.

42. Where the plaintiff (to avoid the expense of a defence of payment or set-off) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, or which the plaintiff admits the defendant is entitled to set-off, it shall not be necessary for the defendant to plead the payment or set-off of such sum or sums of money.

When credit given by plaintiff for set-off, it need not be pleaded.
R. G., Pl. T. T., 1853, r. 13.

But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums, or to cases of set-off where the plaintiff does not state the particulars of such set-off.

See *ante*, p. 10.

43. Where a defendant shall rely upon a judgment recovered in another Court, by way of defence, he shall, at the foot of such defence, state the date of such judgment; and if such judgment shall be in a Court of Record, the number of the roll on which such judgment is entered, if any; and in default of such statement, the plaintiff shall be at liberty to sign judgment as for want of a defence; and in case such statement shall be falsely made by the defendant, the plaintiff may apply to the Court by motion, on notice, for liberty to make judgment, on a certificate from the proper officer or person having the custody of the records or proceedings of the Court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as stated in the pleading.

Defence of judgment recovered.
R. G., H. T., 1853, r. 10.

See *McKenna v. Burke*, 5 Ir. C. L. R. 110.

44. The affidavit to verify a dilatory pleading, pursuant to the statute 6 Anne, c. 10, s. 11, shall be annexed to such pleading, and entitled in the cause.

Affidavit to verify dilatory pleading.

See *ante*, p. 93.

45. If either party, without a rule for that purpose, plead and demur, or reply and demur, or plead or reply several matters for the pleading of which a rule is required by the Common Law Procedure Amendment Act (Ireland) 1853, the opposite party may mark judgment without motion.

In case of double pleading without leave, judgment may be marked.

See *ante*, p. 56.

46. A defendant shall not be at liberty, without the consent of the plaintiff, to file a confession of action, or consent for judgment, containing any stay of execution, or specifying a sum for debt or damages, less than that claimed by the plaintiff, or with a blank for debt or damages.

Confession of action not to contain a stay, &c., without consent.

Counsel's
signature
not neces-
sary.

47. Confessions of action and consents for judgment may be filed without the signature of counsel thereto.

Judgment on
confession
and plea of
*plene admini-
stravit*.

48. On the filing of any confession, consent for judgment, or plea of *plene administravit*, or *plene administravit præter*, the plaintiff may enter a rule for the proper judgment, and mark judgment thereon.

Plea of ten-
der and ac-
ceptance by
plaintiff;
defendant to
have his
costs of suit.

49. In case money be lodged in Court upon a plea of tender, and the plaintiff shall be willing to accept the same in full satisfaction of the demand with respect to which the tender has been pleaded, the defendant shall be entitled to his costs of suit, so far as relates to such demand, the same to be deducted from the amount of such lodgment, and the plaintiff shall only be entitled to draw the balance; and if the sum so lodged be insufficient to answer the defendant's costs, the defendant shall be entitled to an order for the payment of the balance thereof.

See sect. 76, C. L. P. Act, 1853, whence it would seem to appear that a plaintiff may in all cases draw money lodged under a defence of tender before verdict or judgment for defendant, or peremptory order for payment of costs for not proceeding to trial. In practice, however, a plaintiff will not be allowed to draw the money without paying the defendant his costs.

Demurrer
books for the
Judges,
See R. G., H.
T., 1853,
rr. 14-16.

50. When a demurrer shall have been filed, the party filing the demurrer shall, within six days thereafter, make up the paper books for the judges, and deposit the same in the office of the Clerk of the Rules, where they shall remain two days for the examination of the opposite party; on the expiration of which period they shall be delivered to the judges by the Clerk of the Rules, and the case set down by either party for argument by side-bar rule. And if the books be not made up and lodged within the specified time as aforesaid, by the party filing the demurrer, the demurrer shall be considered as set aside, and the opposite party shall be at liberty to proceed as if no such demurrer had been filed; and if there shall be a demurrer on the part both of plaintiff and defendant, the plaintiff shall be considered as the party bound to make up the books within the meaning of this rule; and in case he shall fail so to do, his demurrer shall be considered as set aside, and the demurrer of the defendant allowed. And the costs of such books shall, in all cases, follow the judgment on demurrer.

See *ante*, pp. 75-80.

Lodging the
demurrer
books.

If the party demurring fails to lodge the demurrer book within six days, the demurrer is to be considered as set aside. Under such circumstances the party demurring should not refile the demurrer without the

leave of the Court (*Slevin v. Manders*, Ir. R. 2 C. L. 305). Neither should he lodge the demurrer books, but in a proper case he may apply to the Court for leave to refile the demurrer (*Gregory v. Levins*, 2 Ir. L. T. 23).

51. All paper books for the Judges on demurrer shall be fairly written upon post paper, bookwise, with a margin of two inches, and shall contain only such parts of the pleadings as relate to the subject-matters to be argued, with the names of the counsel and attorney on both sides, (and also a specification of the grounds of demurrer), and shall be noted in the margin, and contain an index denoting the page at which each pleading may be found.

Demurrer books, how to be made up.
See R. G., H. T., 1853, rr. 16-17.

SECURITY FOR COSTS.

52. Where a defendant served with a summons and plaintiff shall require security for costs from the plaintiff, he shall be at liberty to apply by notice to the plaintiff for such security; and in case the plaintiff shall not, within twenty-four hours after service thereof, undertake by notice to comply therewith, the defendant shall be at liberty to apply to the Court or a judge for such security by motion on notice, grounded upon affidavit; and every such application shall be made before defence filed, unless the Court shall under special circumstances think fit to make such order after defence filed.

Preliminary notice for security for costs, and when application to be made.
See R. G., H. T., 1853, r. 22.

See *ante*, p. 50.

53. Where a plaintiff shall have been ordered to give security for costs, he may comply therewith, either by entering into a recognizance by two securities in an amount to be measured by the officer, or by lodging in court the amount so measured in lieu of such security; and a side-bar rule to lodge the amount may be entered as of course.

Order for security how complied with.

54. The service of any notice relative to the giving security for costs shall not operate as a stay of proceedings; but in case the party shall comply with the preliminary notice to give security for costs, or the court or a judge shall make an order for such security, the defendant shall have the same time for filing his defence after such security shall have been given, as he had at the time of the service of such preliminary notice; the time allowed to be in no case less than twenty-four hours.

Time for pleading after.

See *ante*, p. 103.

BILL OF PARTICULARS.

Particulars to be annexed to abstract for Nisi Prius. 55. A copy of the particulars of plaintiff's demand, and of defendant's set-off (if any), shall be annexed by the attorney to the abstract for *Nisi Prius*, at the time of lodging the same with the judge's registrar.

COPY OF DOCUMENTS.

Rule for costs of copy furnished. 56. If any party, having required a copy of any deed or document, shall not pay for the same on the tender thereof, the opposite party may enter a side-bar rule to lodge such copy with the Master, and for the costs of such copy and rule.

Time for pleading after copy furnished. 57. When any party shall have served a notice, requiring a copy of any deed or document, he shall have the same time for filing his pleading after compliance with such notices as he had at the time of service thereof, such time to be in no case less than twenty-four hours.

See *ante*, p. 64.

Notice for the admission of documents. R. G., H. T., 1853, r. 29. 58. The form of notice to admit documents referred to in the Common Law Procedure Amendment Act (Ireland) 1853, section 118, may be as follows :

In the Q. B., C. P., }
or Exchequer. } A. B. v. C. D.

Take notice that the { Plaintiff
Defendant } in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the { Defendant
Plaintiff } his attorney or agent, at on between the hours of and the { Defendant
Plaintiff } is hereby required, *within forty-eight hours from the last-mentioned hour*, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed as they purport respectively to have been ; that such as are specified as copies are true copies ; and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively ; saving all just exceptions to the admissibility of all such documents as evidence in this cause.

Dated, &c.

To E. F., Attorney

for { Defendant.
Plaintiff.

G. A., Attorney

for { Plaintiff.
Defendant.

[Here describe the documents, the manner of doing which may be as follows]:—

ORIGINALS.

Description of the Documents.	Date.
Deed of covenant between A. B. and C. D., } first part; and E. F., second part ... }	1st January, 1848.
Indenture of lease from A. B. to C. D. ... }	1st February, 1848.
Indenture of release between A. B., C. D. } first part, etc. ... }	2nd February, 1848.
Letter—Defendant to Plaintiff ... }	1st March, 1848.
Policy of Insurance on goods by ship } “Isabella,” on voyage from Oporto to } Dublin ... }	3rd December, 1847.
Memorandum of agreement between C. D., } captain of the said ship, and E. F. ... }	1st January, 1848.
Bill of exchange for £100 at three months, } drawn by A. B. on and accepted by C. D., } endorsed by E. F. and G. H. ... }	1st May, 1849.

COPIES.

Description of Documents.	Dates.	Original or Duplicate served, sent, or delivered, when, how, and by whom.
Register of baptism } of A. B. in the pa- } rish of ... }	1st January, 1808.	Sent by General Post, February 2, 1848. Served March 2, 1848, on Defendant's At- torney, by E. F. of
Letter—Plaintiff to } Defendant ... }	1st February, 1848.	
Notice to produce } papers ... }	1st March, 1848.	
Record of a Judg- } ment of the Court } of Queen's Bench } in an action, J. S. } v. J. N. ... }	Trinity Term, 10th Vic.	
Letters Patent of } King Charles II. } in the Rolls office }	1st January, 1680.	

See ante, p. 131.

WRIT OF INQUIRY.

When to be tested and returnable.

59. Every writ of inquiry shall be tested of the day it actually issues, and may be made returnable at any time within three months from the day of issuing the same.

Notice of speeding, what to state.

60. Notice of speeding an inquiry before the sheriff or master shall state that the inquiry will be had at a certain place, and on a certain day, and between certain hours specified therein; but in case the sheriff or master shall be unable to proceed thereupon in consequence of other business, he shall be at liberty to adjourn the same from day to day until same can be heard; and in cases where either party shall have counsel to attend on such inquiry, notice thereof shall be given in writing to the opposite party two days before the time fixed for proceeding with such inquiry.

Form of notice.

61. Notice of speeding an inquiry before a Judge, shall be in the same form, *mutatis mutandis*, as notice of trial at *Nisi Prius*.

Order for special jury.

62. In case it shall appear to the Court, on the application of either plaintiff or defendant by motion on notice, that it would be proper that the trial of any inquiry, whether before a Judge or the sheriff, should be by a special jury, an order shall be made accordingly, in which such provision shall be made as to costs or otherwise as the Court may think fit, and such jury shall be empanelled in the same manner as special juries at *Nisi Prius* trials.

See *ante*, p. 106.

Execution not stayed unless notice of motion given.

63. Where a Sheriff or other officer shall upon the speeding of a writ of inquiry, give a certificate under the 100th section of the Common Law Procedure Amendment Act (Ireland), 1853, the plaintiff shall be at liberty to proceed as if no such certificate had been given, unless the defendant shall, within ten days after the speeding of the inquiry, serve notice of motion to set aside the inquisition.

If notice of motion be given, plaintiff shall not proceed for six days.

64. Where the sheriff or other officer shall refuse to grant a certificate under the 100th section of the Common Law Procedure Amendment Act (Ireland), 1853, if the party whose application for such certificate shall be refused, shall thereupon give to the opposite party notice of his intention to apply to a Judge for an order under the said section, the opposite party shall not be at liberty to proceed under the said section until the expiration of six days after the day of the finding; but unless the party so expressing his intention shall within the said six days serve notice of such motion, specifying the grounds of the application, the opposite party may then proceed to judgment and execution, as authorized by the said section.

65. In all writs of inquiry or references before the Master of the Court, either party may call on the other party, by notice, to admit documents, in the manner provided by, and subject to, the provisions of the Common Law Procedure Amendment Act (Ireland), 1853, and the 58th rule; and in case of the refusal or neglect to admit after such notice given, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the inquisition, or on the reference, the presiding officer or Master shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except in cases where the omission to give the notice is, in the opinion of the Taxing Officer, a saving of expense.

Notice to admit documents before Master.

DISCONTINUANCE.

66. At any time before verdict found, or demurrer argued, or writ of inquiry executed, the plaintiff may obtain a side-bar rule as of course, for liberty to discontinue, on paying the defendant his costs in the cause when taxed.

Rule to discontinue.

The plaintiff may discontinue the action as of course upon the payment of costs at any time before the several times specified in the order. As to discontinuing without payment of costs see *Irwin v. Thompson*, Cr. & Dix. Ab. Not. Cas. 422; *Gray v. Cox*, 2 Dowl. 220; *Ford v. Stock*, 1 Dowl. N. S. 763. When the plaintiff discontinues, the defendant is entitled to costs although the plaint was never filed (*Moylan v. Healy*, 8 Ir. C. L. R. Ap. 52); and until the costs are paid the action still remains pending so that the plaintiff cannot commence a new action (*Clifton v. Boulger*, 6 Ir. Jur. N. S. 102; *Pearn v. The Commissioners of Drainage*, 5 Ir. Jur. O. S. 250). So also until the costs are paid the plaintiff may be compelled to proceed as usual (*Beeton v. Japp*, 15 M. & W. 149); and where the plaintiff instead of paying costs went on and obtained a verdict, the verdict was upheld (*Edgington v. Proudman*, 1 Dowl. 152); and *c. f.* (*Stokes v. Woodeson*, 7 T. R. 6).

Discontinuance.

Where after a rule to discontinue had been entered the defendant's costs were furnished but not taxed, the Court gave liberty to the plaintiff to proceed in another action for the same cause on lodging in Court the amount of costs claimed by the defendant (*Bredin v. Corcoran*, 12 Ir. C. L. R. Ap. 9); and if the defendant makes default in furnishing his costs the plaintiff may apply to the Court for the purpose of compelling him to furnish them.

The defendant may register a rule to discontinue without specifying the amount of costs which may be added to the rule when taxed and ascertained (*Tilly v. Fletcher*, 7 Ir. C. L. R. 3).

NUL TIEL RECORD.

Points in support of, &c., to be furnished.

67. With every pleading of *Nul Tiel Record*, the party filing such pleading shall furnish a statement signed by counsel of the points on which he intends to rely in support of such pleading, and shall furnish a copy of the same, together with copies of the pleadings, to the Clerk of the Rules on the day before the day fixed by the rule for inspecting the record.

Nul Tiel Record cannot be pleaded to an action upon a colonial judgment (*Chapman v. Sherrie*, Ir. R. 5 C. L. 36).

As to what will amount to a variance upon a plea of *Nul Tiel Record* see *Gordon v. Hassard*, 9 Ir. C. L. R. 195.

Rule to inspect Record.

68. Where *Nul Tiel Record* shall have been pleaded, either party may, as of course, enter a rule that a certain day, to be therein named, be appointed for inspecting the record stated in the pleadings.

Proper officer to attend with record.

69. On production of the rule for inspecting the record to the officer of any of the said courts in whose custody the record may be, such officer shall attend with the original record at the sitting of the Court on the day fixed for the inspection of the same.

EVIDENCE.

Interrogatories, &c., to be signed by counsel.

70. All interrogatories and cross-interrogatories for the examination of witnesses shall be prepared and signed by Counsel, and the Taxing Officer shall be at liberty to allow a fee to him for preparing the same.

Number of witnesses' names in subpoena.

71. Any number of names of witnesses may be inserted in any writ of *Subpœna*.

Officer's signature to rule, &c., need not be proved.

72. Every rule or order, and every attested copy issued from any of the said Courts, and purporting to be signed by the proper officer, shall be received in evidence upon the trial of any issue, without proof of such signature, or of the attestation or comparison thereof.

Public records not to be produced without special order.

73. No writ of *Subpœna* shall issue for the production of any record in the custody of the Paymaster of Civil Services or other officer of her Majesty without an order of the Court on motion, of which notice shall be given to the Crown Solicitor of the district wherein such record is deposited; and such officer having the custody of any such record shall not be obliged to remove the same under such writ from the depository where same is

placed, without such order, to be served upon him with the writ of *Subpœna Duces Tecum*.

ABSTRACT. FOR NISI PRIUS.

74. In case it shall become necessary to settle the issues and abstract for *Nisi Prius* before a Judge, the attorney for the party requiring a summons shall lodge with the Clerk of the Rules of the Court a correct copy of the draft abstract of the pleadings, and of the issues proposed, as theretofore furnished; and the Clerk of the Rules shall thereupon issue a summons for such time and place as the Judge shall approve.

Settlement
of issues
before a
judge.

See *ante*, p. 109.

75. No case, whether an action be now pending, or otherwise, shall be entered in the list of abstracts for trial at *Nisi Prius* in Dublin, unless a docket shall be lodged with the Registrar four clear days before the day for which notice of trial shall have been served, stating the names of the parties in full; in what capacity they sue and are sued; the general nature of the cause or causes of action and of the defence and other pleadings, and the names of the attorneys of the respective parties; and all abstracts for trial shall be sealed and lodged with the Registrar the day before the same shall be called on; and in all cases where such abstract shall have been lodged with the Registrar, and a confession of action or consent for judgment shall subsequently be given, the plaintiff's attorney shall immediately give notice to the Registrar that such cause will not proceed to trial.

Abstracts
for Nisi
Prius, when
to be lodged.

76. No Civil Bill Appeal, Registry Appeal, or other Appeal, shall be entered in the list, unless an abstract shall have been lodged with the Registrar two clear days before the day for which notice of hearing shall have been given, stating the names of the parties in full, their respective attorneys, the nature and particulars of the decree or dismiss or order appealed from, and the Court from which the appeal is brought.

Appeals,
when to be
lodged.

TRIAL AT BAR.

77. In order to obtain a trial at bar, an application shall be made to the Court by motion or notice, grounded on affidavit; and the order for a trial at bar shall state the day on which the trial shall commence.

Trial at bar,
how ob-
tained.

78. The application for a trial at bar may be made at any time in term, and in any term; and it shall not be necessary to lodge any sum of money with the officer to defray the expenses of the jury, or for any other purpose.

Application
when to be
made.

Proceedings
on excep-
tions.

79. When a party shall have taken exceptions upon any trial at bar, he shall, at the expiration of two days from the furnishing of the draft, whether the same shall have been returned or not, serve notice of motion to settle and sign the same before the Court, whereupon same shall be settled and signed by the Judges; and within two days after the settling and signing of the bill of exceptions, the party taking the same shall proceed to allege error, pursuant to the 170th section of the Common Law Procedure Amendment Act (Ireland) 1853.

Books for
argument.

80. In the Court of Exchequer Chamber, the mode of proceeding as to preparing the books and setting down the case for argument, shall be the same as directed by the 50th Rule with reference to demurrers.

Motion for
new trial,
&c., to be
on notice.

81. Every motion for a new trial, or to set aside a verdict or non-suit on a point saved, or on any other ground, after a trial at bar, shall be by motion on notice, which notice shall be served within the first four days of the term next after such trial.

TRIAL AT NISI PRIUS.

Sheriffs to
keep panel
of special
jurors for
inspection.

82. Sheriffs shall, seven days before the commission day, or first day of the *Nisi Prius* sitting after term, make and keep at their offices, for inspection, a printed copy of the panel of the special jurymen to try special jury causes at the assizes or after-sittings, as directed by the Common Law Procedure Amendment Act (Ireland) 1853; but such special jury need not be summoned, except notice be given, as provided for by the 115th section of the said Act.

Notice of
trial when
demurrer
filed.

83. Where a demurrer shall have been filed after notice of trial served, such notice shall be deemed to be a notice as well to try the issue in fact, as to inquire of the damages to be assessed on the demurrer.

Bill of excep-
tions, when
to be fur-
nished.

84. When any party shall have taken exceptions at a trial, he shall, ten days before the next succeeding term, if the trial shall have been had at the assizes, or in the sittings after term, or two days after the trial, if in term, or in the sittings after Easter Term, furnish a draft of the bill of exceptions to the opposite party, with a notice calling on him to return the same in four days, settled on his behalf.

In computing the period of ten days prescribed by the above order the holidays mentioned in the 232nd. sect. of the C. L. P. Act 1852, must be excluded (*White v. Tyrrell*, 5 Ir. C. L. R. 278; *Hassard v. Caulfield*, 7 Ir. Jur. O. S. 141). The provisions of the present order as to the time within which a bill of exceptions is to be furnished must be strictly complied with (*White v. Tyrrell*, *ali supra*). Where however in consequence of special circumstances, as for instance the engagement of Counsel, in

the ordinary business of assizes it has not been possible to comply with the requirements of the order, the time may be extended (*Butler v. Mountgarret*, 4 Ir. C. L. R. 256; *King v. Poe*, 1 Ir. L. T. 192).

85. On the expiration of four days from the furnishing of such draft, whether the same shall be returned or not, the party excepting shall issue a summons to settle the same before the Judge who tried the cause, whereupon the same shall be settled and signed by such Judge, at such time as he shall think proper; and within two days thereafter the party excepting shall file the same, and proceed to make up the paper books for the Judges, and set down the case for argument in the same manner as directed by the 50th rule with reference to demurrer books.

Settling bill of exceptions.

The requirements of this order must also be complied with and the parties cannot by their agreement waive the effect of *laches* (*Lynar v. Foster*, 6 Ir. Jur. O. S. 241).

When the party excepting is guilty of delay in settling the bill of exceptions, the opposite party should not issue a summons to settle, but should apply for leave to serve a notice on the exceptant to settle or otherwise that judgment will be marked (*Kilroy v. Midland G. W. Ry. Co.* 4 Ir. C. L. R. 252).

86. All paper books of bills of exceptions shall contain the abstract for *Nisi Prius* and bill of exceptions, with the names of the counsel and attorneys on both sides, and shall be made out in the same form and manner as directed by the 50th rule with reference to demurrer books.

Books for argument, what to contain.

87. The proceedings on special verdicts and special cases shall be the same, *mutatis mutandis*, as on bills of exceptions.

Like proceedings on special verdicts and cases.

88. Every application to set aside a verdict or non-suit, or in arrest of judgment, shall be made within the first four days of the term next after the trial, if had either in the sittings after term or at the Assizes, or within the first four sitting days after the trial, if had in term.

Motion to set aside verdict, when to be made, see R. G., H. T., 1853, r. 50.

89. Where any party shall seek to set aside a verdict or non-suit, or move in arrest of judgment, he shall, in the first instance, apply to the Court by motion, without notice.

Motion to be without notice.

90. No application to set aside a verdict or non-suit shall be grounded upon affidavit, except in cases where the party seeking to set the same aside shall rely upon surprise or fatality, or upon the discovery of new evidence; or upon the verdict or non-suit having been obtained by fraudulent or improper practice, or misconduct; and in all such cases, the affidavit to be made shall

Motion, when to be grounded on affidavit, see R. G., H. T., 1853, r. 52.

be confined to the above-mentioned grounds for questioning the verdict or non-suit, or some of them, as the case may be ; and in all other cases such application shall be grounded on a certificate of the leading counsel at the trial, containing a short abstract of the proceedings thereat, and the grounds on which, in his opinion, the application should be rested.

Where trial before judge of another court documents to be furnished.

91. Where a conditional order shall have been granted to set aside a verdict or non-suit, the party obtaining the order shall, in case the trial was had before a judge of another Court, furnish to the junior judge of the Court making the order, a copy of such order, and the documents on which the same was founded, together with the name of the judge who tried the cause, in order that a report of the trial may be obtained for the information of the Court.

JUDGMENT.

Affidavit to verify debt in judgment by default.

92. An affidavit specifying the sum actually due, shall be filed before any judgment by default shall be marked, under the 96th or 97th sections of the Common Law Procedure Amendment Act (Ireland) 1853.

Warrant of attorney to be witnessed by an attorney.

93. Every warrant of attorney to confess judgment in an action upon a bond, or writing obligatory recited therein, or collateral therewith, shall have an attesting witness and no such warrant given by any person in custody of a sheriff or other officer shall be of any force, unless there be present some attorney on behalf of such person in custody, expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant, before the execution thereof, which attorney shall subscribe his name as a witness thereto, and declare himself to be attorney for the defendant, and that he subscribes as such attorney.

Bonds and warrants.

This and the next three orders make provision for the entering of judgment upon bonds and warrants. In addition to the requirements of the General Orders, bonds and warrants and the proceedings thereon are subject to the provisions of 3 & 4 Vict. ch. 105, ss. 10-18 (which see in part III. of the Appendix), and of sections 333-337 and 339 of 20 and 21 Vic., ch. 60, referred to in the note to the 96th G. O.

Marking judgment on.

When a bond and warrant are less than ten years old, judgment may be marked in the office provided the warrant has not become revoked by the death of the parties or otherwise (as to which see *infra*). When the bond and warrant are over ten years given, an application for leave to mark judgment must be made to the court. The application is *ex parte* in the first instance, and must be supported by an affidavit containing the several matters mentioned in the next order. The warrant must be produced in Court when the application is made, and must in all cases be filed when judgment is entered. If the bond is given to secure the payment of a sum of money in one sum, execution may be issued as soon as

the judgment is marked. As a general rule, breaches must be suggested and damages assessed in all other cases before issuing execution. See sections 145-147 of the C. L. P. Act, 1853, *ante*, pp. 166-169.

A warrant of attorney can only be given by a person capable of appointing an attorney, and if given by a person who is not capable of doing so, it will be set aside. It must be attested by a witness, and if given by a person in custody it must be attested by an attorney acting on behalf of the person giving it in the manner prescribed by the above order. See as to the construction of the order *Nolan v. Gumley*, 14 Ir. C. L. R. 301; *Hornsby v. Wilson*, 1 Ir. Jur. N. S. 204; *Sanderson v. Westley*, 6 M. and W. 98.

If the warrant of attorney be given subject to any defeasance or condition, the defeasance or condition must be written on the same paper as the warrant of attorney before filing it, otherwise it will be null and void (3 & 4 Vic., ch. 105, sec. 14). When the sum secured by the bond and warrant is settled by marriage settlement, the settlement is not a defeasance within the meaning of the statute (*Walsh v. Dower*, 2 Ir. C. L. R. 102); and *c. f.* as to the construction of the statute *Conlan v. M'Anaspie*, 10 Ir. L. R. 295, and the note to the 96th G. O. *post*.

A warrant of attorney cannot be revoked by any express act of the obligor (*Odes v. Woodward*, 2 Ld. Raym. 850). After the death of the obligor, judgment cannot be entered up in or as of a term subsequent to the time of the death; but on the doctrine of relation it may be entered upon any day of the term during which he died, or of the subsequent vacation. If entered up at a later period it will be set aside (*McKeogh v. Hurst*, 3 Ir. Jur. N. S. 92); neither can the obligor authorize the obligee to enter up a judgment at a later period (See *Cowie v. Allanay*, 8 T. R. 257). After the death of the obligee his executor cannot enter up a judgment on the bond (*Robinson v. Campbell*, Long and Town, 192), unless the executor is expressly empowered by the warrant (*Coles v. Haden*, Barnes, 44). Where there are several obligors, judgments cannot, after the death of one, be entered against the others unless the warrant authorizes the entering of several judgments (*Stanfield v. Wilson*, 8 Ir. L. R. 100; *Magee v. Magill*, 5 Ir. L. R. 186; *Gee v. Lane*, 15 East, 592); but after the death of one of several joint obligees the survivors may enter up judgment pursuant to the warrant (*Fendall v. May*, 2 M. and S. 76). In *Hickey v. Musgrave*, 3 Ir. C. L. R. 446, the Court made a conditional order giving leave to one executor to enter judgment against the other, upon a bond and warrant given by both to the testator.

If the obligee become a bankrupt the assignee cannot enter up a judgment under a warrant of attorney given to the bankrupt (*Archer v. Carroll*, 2 Fox & Sm. 43).

Marriage does not operate as a revocation of a warrant of attorney, and if, therefore, one *feme sole* give a warrant of attorney to another, and both marry, judgment may be entered up by husband and wife against husband and wife (*Schroeder v. Wright*, 2 Jones 483).

If the warrant of attorney be fraudulently obtained or the giving of it is tainted with illegality, the Court has full jurisdiction to order the warrant to be given up and cancelled (Ch. Ar. Pr. 12th ed. p. 958). So also if the party giving the warrant was an infant or married woman, it will be set aside. Where a joint judgment had been marked on a bond and warrant given by several parties, one of whom was an infant, the Court set aside the

judgment against the infant but allowed the judgment to stand against the other obligors (*England v. Chapman*, 5 Ir. Jur. N. S. 291); see, however, *Lucas v. Evans*, Cr. and Dix Ab. Not. Cas. 613; *Harris v. Wade*, Chet. Rep. 322. As to the defendant in such cases waiving his right to have a judgment marked under the warrant set aside by reason of laches or otherwise, see *Roddy v. Clements*, Jon. and Car. 170; *O'Connor v. Purdon*, Hay. and Jon. 653; *Nolan v. Gumley*, 14 Ir. C. L. R. 301; *Macnamara v. Brown*, 5 Ir. L. R. 460. If in such cases the Court finds a difficulty in deciding between the parties in consequence of conflicting affidavits, etc., it may set the judgment aside, and at the same time allow the plaintiff to bring an action upon the bond (*Connor v. Connolly*, 1 Ir. L. R. 244).

Judgment on warrant may be entered within ten years without motion, afterwards by motion. See R. G., H. T., 1853, r. 26.

94. At any time within ten years from execution of any warrant of attorney to enter judgment on a bond, judgment may be marked thereon as of course in the office, but after such period no judgment shall be marked on any warrant of attorney, unless by order of the Court on motion without notice, which order shall be conditional in the first instance, unless for special reasons the Court shall otherwise direct; and the application for every such order shall be grounded on an affidavit, stating the amount remaining due on foot of such bond and warrant, and the character in which the applicant claims to be entitled, and that the obligor was alive on some day in the term in which such application shall be made, if made in term, or if in vacation, on some day in the term immediately preceding, or the succeeding vacation; and in case the warrant shall be upwards of twenty years old, such affidavit shall contain matter sufficient to take the case out of the statute of limitations, and in case the payment of money shall be relied on for that purpose, shall state by whom and to whom such payment shall have been made.

As provided above, a conditional order only will be made in cases where it becomes necessary to apply to the Court for leave to mark a judgment, unless for special reasons the Court shall otherwise direct. For instances of cases where an absolute order has been made in the first instance, see *Galavan v. Galavan*, Ir. R. 2 C. L. 88; *Kennedy v. Davis*, 6 Ir. L. R., 113.

Warrant to be produced in Court.

95. No order shall be made to enter judgment on any warrant of attorney or Kerry bond, unless the original warrant or Kerry bond shall be produced upon the motion.

Where it was sworn in an uncontradicted affidavit that the warrant of attorney had been executed, and was in the possession of a third party from whom it could not be obtained, the Court notwithstanding refused to allow judgment to be entered up (*McEwen v. Charleville*, 6 Ir. L. R. 144).

96. Where any judgment shall be entered by virtue of a warrant of attorney, the warrant shall be filed at the time of entering such judgment in the office, and in cases where the warrant is incorporated in the bond, as in Kerry bonds, the bond itself shall be filed; and a book shall be kept in such office in which shall be entered the names of the parties to every such judgment, and the term in which every such judgment shall have been entered, with proper reference to the file of warrants.

Warrant to be filed when judgment entered.
R. G., H. T.,
1863, r. 25.

After a judgment had been marked and the warrant of attorney filed, the Court gave leave to take the warrant of attorney off the file for the purpose of having a judgment entered on it in one of the English Courts, upon the terms of vacating the judgment marked here (*Wall v. Lightburne*, 4 Ir. L. R. 177).

In addition to the requirements of the above order, it is provided by section 334 of 20 & 21 Vict., ch. 60, that if any warrant of attorney, or cognovit given by a bankrupt or insolvent, or a copy thereof, shall not be filed in the Court in which the judgment is afterwards entered up within twenty-one days after the execution thereof, the warrant shall be deemed fraudulent, null, and void to all intents and purposes whatsoever; and it is further provided by that section that any defeasance to which the warrant is subject must be written on the same paper with it before filing. By section 333 it is moreover enacted that every warrant of attorney given by a bankrupt or insolvent within two months of the filing of a petition of bankruptcy or insolvency, and being wholly or in part for or in respect of any antecedent debt or money demand, such bankrupt or insolvent being unable to meet his engagements at the time, shall be deemed and taken to be null and void. In *The Assignees of Skelly v. Keefe*, 17 Ir. C. L. R. 232, judgment was marked on the warrant within twenty-one days, but the warrant was not filed. The judgment was duly registered and execution issued and realized, and it was held the assignees could not sue the obligee for the value of the goods. In *James v. Magennis*, Ir. R. 2, C. L. 100, it was held that where a judgment was marked upon a bond and warrant given within two months of bankruptcy, and execution issued under which the defendant bought a chattel real of the bankrupts, the assignees could not maintain an ejectment for it. And the decision was upheld in the Exchequer Chamber.

How affected by bankruptcy.

COSTS.

97. The fees, allowances, and charges mentioned in the first schedule to these orders, shall be the established fees, allowances, and charges to be allowed to attorneys on the taxation of costs; and in such taxation regard shall be had to the several instructions and directions contained in such schedule; but inasmuch as the said schedule is only intended to fix the amount of each fee or charge, whether between party and party, or between attorney and client, it shall not be deemed to authorise any fee or charge as between party and party which ought only be chargeable as between attorney and client.

Schedule of costs to be followed when applicable.

Principle of taxation.

98. The principle of taxation to be acted on in taxing bills of costs between party and party, shall be as nearly as possible the same as that applied in taxing bills between attorney and client; subject, however, to the discretion of the officer to allow, disallow, or modify particular charges, under the control of the Court.

Taxing officers may make orders.

99. The taxing officers shall be at liberty, from time to time, to issue general directions respecting the mode of preparing affidavits to be used before them, and likewise as to the mode of preparing bills of costs and the use to be made of printed forms of bills of costs in common cases, and the charges to be made for costs to which such forms are applicable, and such other directions as they may consider necessary in relation to the taxation of costs; and all such directions shall be submitted to, and approved of by the Judges, or any seven of them, whereof two shall be Chief Judges, before they shall be of any effect; provided, however, that this order shall not apply to any directions of the taxing officers which shall have been issued by them before the date of these orders.

Judge at trial may certify witness unnecessary and no costs.

100. The Judge at *Nisi Prius* may, if he shall think fit, certify on the back of the record, at the trial, that in his opinion, any particular witness produced at either side was unnecessary; and in the taxation of costs the expense of such witness shall not be allowed against the opposite party.

Costs of one writ only, unless sufficient cause.

101. Where several writs of the same description shall be issued into several counties in any action, the taxing officer shall, in taxing costs, disallow the costs of more than one, unless sufficient grounds be laid before him for issuing more.

Costs of registration of judgment.

102. The Master in awarding the costs of a judgment shall, on production of a certificate of the registration of such judgment, under the 13th and 14th Vic., chap. 74, add to the costs therein the sum of One Pound as and for the costs of such registration.

Judge at trial to determine whether plaintiff entitled to full costs, under 243rd section

103. In cases falling within the 243rd section of the Common Law Procedure Amendment Act (Ireland), 1853, the Judge shall, upon the application of the plaintiff, determine whether the plaintiff is entitled to full costs; such application to be made at the conclusion of the trial, or during the sittings or assizes, and the order of the Judge shall be endorsed on the record.

EXECUTION.

Several executions may be issued together.

104. A plaintiff may issue any number of writs of execution of the same kind at the same time to different counties; but the taxing officer shall disallow the costs of such as he may consider unnecessary.

Forms of execution in schedule to be adopted.

105. The writs of execution in the second schedule to these orders shall be used, with such alterations as the nature of the action, the description of the Court in which the action is pend-

ing, the character of the parties, or the circumstances of the case may render necessary; but any variance not being in matter of substance, shall not affect the validity of the writs sued out.

106. The place of abode and addition of the party against whom any writ of *capias ad satisfaciendum*, or *feri facias*, shall issue, or such other description of him as the attorney for the plaintiff or his agent may be able to give, shall be endorsed on such writ; but this rule being intended for the protection of the sheriff, no Defendant shall be allowed to take advantage of the want of such endorsement; and it shall not be necessary to state the place of abode or addition of either party, in the body of such writ.

Residence and addition of party to be endorsed.

A Sheriff seized the goods of a third person under a *fi. fa.* The *fi. fa.* was endorsed by the attorney as follows: "The defendant is a widow lady, and resides at 15, Mespil Parade, in the county of Dublin, where she has goods and chattels," which description correctly described the third person whose goods were seized. It was held that the attorney was personally liable as a trespasser (*Stratton v. Lawless*, 14 Ir. C. L. R. 432), and c.f. *Jarmain v. Hooper*, 7 Sc. N. R. 663; *Blackburne v. Stratton*, 11 Ir. C. L. R. Ap. 12.

SCIRE FACIAS AND WRIT OF REVIVOR.

107. In every writ of revivor, or *Scire Facias*, to revive a judgment, it shall be lawful for the plaintiff, or his representative, to suggest breaches, if necessary.

Suggestion of breaches in *scire facias* and writ of revivor.

108. No writ of *Scire Facias*, or revivor, to revive a judgment in ejectment, shall issue without an order of the Court, on motion of counsel.

Revival in ejectment by special motion.

109. When an application shall be made to issue a writ of revivor on a judgment above ten years from the entry thereof, the same shall be grounded on affidavit, stating the amount remaining due on foot of the judgment, and the character in which the applicant claims to be entitled to issue the writ, and against whom the same is sought to be issued; and in case twenty years shall have elapsed from the entry of the judgment, such affidavit shall state matter sufficient to take the case out of the statute of limitations, and, in the latter case, the order shall be conditional only in the first instance, unless for special reasons the Court shall otherwise direct.

Application for writ of revivor, affidavit necessary.

110. All General Rules herein contained shall extend to writs of revivor and *Scire Facias* (unless where the same shall not be applicable), *mutatis mutandis*.

General rules to apply to revivor and *scire facias*.

ATTORNEYS.

Indentures
to be
enrolled.

111. All indentures of apprenticeship, and assignments thereof, shall be enrolled in the Rules' Offices of the said Courts respectively, and the Examiners of the said Courts respectively shall, without any special rule, inquire into the case of every apprentice applying to them for their certificate; and in all cases of special applications by persons seeking to be admitted attorneys of any of the said Courts, the person so applying shall serve a notice on each of the Examiners of the Court to which he shall so apply, and on the Secretary of the Society of Attorneys and Solicitors, ten days previous to making such application, stating the nature of the intended application, and the circumstances which render it necessary, and an affidavit of the service of such notice shall be produced in Court on the motion.

Registry of
attorneys'
names and
residences.

112. There shall be kept in the office of the Clerk of the Writs a book for the annual registry, in alphabetical order, of the names and Dublin residences of all attorneys of the said Courts, which registry shall be made by the Clerk of the writs, on production of the annual stamp-office certificates of the said attorneys respectively, according to the description therein contained, and shall be open for inspection at all times during office hours, without fee; and no attorney shall practise in any of the said Courts, or have any privilege as an attorney, until he shall have so registered annually his name and Dublin residence, or unless, in case of any change thereof, he shall cause a corresponding change to be made in such registry; and in case any attorney shall require any alteration to be made in the registry as to his residence, he shall furnish to the Clerk of the Writs a docket signed by him, specifying the alteration required, together with his annual stamp-office certificate, and the Clerk of the Writs shall make such alteration accordingly, and enter the date thereof upon the said registry; and due service or delivery at such registered residence of all notices, rules, pleadings, and documents not requiring personal service or delivery, shall be deemed good service or delivery, upon or to the attorney so registered.

Striking
name off
roll at his
own request.

113. Where an attorney shall apply to be struck off the roll, the affidavit to ground such motion shall state that he is not engaged in any suit as plaintiff or defendant; and also that he is not retained in any suit for plaintiff or defendant; and also that there is no complaint, action, suit, or proceeding depending against him, and that he does not apprehend any.

Attorney
struck off or
suspended,
not to prac-
tise in other
courts.

114. When an attorney shall have been struck off the roll of any of the said Courts otherwise than at his own request, or shall have been suspended for misconduct, he shall not be permitted to practise in any other of the said Courts during the time he shall continue so struck off or suspended.

115. No proceedings shall be taken except in the name of the attorney by whom and for whose benefit as attorney such proceedings shall be in fact carried on ; and in case any proceedings shall be taken in the name of any attorney, whether with or without his permission, contrary to the provisions of this rule, same shall be irregular, and liable to be set aside, or the costs thereof disallowed, as the Court shall think fit ; and the party so using the name of any attorney, and any attorney so permitting his name to be used, shall be guilty of a contempt of the Court in which such proceedings shall be taken.

Attorney not to use the name of any other attorney.

116. In all cases where any person shall seek any order or relief against any attorney, grounded on the jurisdiction of the Court over him as an officer, the person seeking such relief or order shall serve a petition stating the facts on such attorney, with a notice of his intention to bring the matter under the consideration of the Court, after the expiration of four days from such service ; and if the petitioner shall think proper to proceed with the said petition, he shall file the same with a verifying affidavit, and serve notice of an application to the Court, grounded on said petition and verifying affidavit, and also on an affidavit of the service of the said petition, and shall move such notice according to the course of the Court.

Petition against attorney as an officer of the Court.

117. No set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the claim of set-off is made ; provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may in all cases be set-off.

Set-off not allowed to prejudice of Attorney's lien. R. G. H. T., 1853, r. 63.

118. Where a side-bar rule shall have been entered to change an attorney, the attorney thereby removed may, on production of the rule to the taxing officer, and after service of his costs upon his client, together with a list of credits (if any), verified by affidavit, proceed to tax such costs ; and the master of the Court shall, on a summons to be issued by him for that purpose, allow such credits as may be just and applicable as against said costs ; and thereupon the attorney shall be entitled to a rule for the payment by his client, within four days after service thereof, of any balance which shall be so ascertained by the officer.

When Attorney changed he is at liberty to tax and enforce his costs.

119. Where an attorney for either party shall die pending the suit, the opposite party may enter a side-bar rule, that the party whose attorney shall have so died do appoint another in four days after service, and in default of such appointment within such time, the party entering such rule, or filing an affidavit of service thereof on the opposite party, shall be at liberty, until such appointment be made and notice thereof given, to serve such party with all subsequent orders and notices which should have been served on such attorney.

Death of attorney. rule to appoint another.

COMPELLING SHERIFF, ETC., TO RETURN WRIT OR BRING IN BODY OR MONEY.

Rule to
compel
sheriff to
return writ.

120. Where a sheriff, or other officer, to whom a writ shall have been delivered shall not return the same according to the exigency thereof, or to the provisions of the 123rd rule, a side-bar rule may be entered, that the sheriff, or other officer, shall return the writ within two days, or that an attachment shall issue; which rule (in case the sheriff shall have gone out of office) may be entered at any time within six months after his so going out of office. And in case the said rule shall not be complied with within two days after the service thereof, or good cause shown against the same, on production to the proper officer of an affidavit of service of the rule on the sheriff or his returning officer, and of the non-compliance therewith, as aforesaid, an attachment may issue without further order.

When the writ has been sent through the post to the sheriff, and not lodged with the returning officer, the usual rule cannot be entered; but the Court will oblige the sheriff to return the writ and pay the costs of the motion (*Cole v. Scott*, 6 Ir. Jur. N. S. 346).

The rule to return the writ will be discharged if there has been collusion between the Plaintiff and the bailiff (*Alchin v. Wells*, 5 T. R. 470; *Ruston v. Flatfield*, 3 B. and Ald. 204), or if the writ be a nullity; where the writ, however, is only irregular, he may be ruled, see *Jones v. Williams*, 8 M. and W. 349; *Miller v. Gethin*, 1 Ir. L. T. 261, in which case the writ contained several erasures, and see *Blackburn v. Stratton*, 11 Ir. C. L. R. App. 12.

Rule to
compel
sheriff to
bring in
body, or
money
levied.

121. When a sheriff or other officer shall have returned *cepi corpus* on any *capias ad satisfaciendum*, or money levied on a *fieri facias*, or *vendittoni exponas*, a side-bar rule may be entered that the sheriff, or other officer, do bring in the body of the defendant, or the amount levied (as the case may be), or that an attachment shall issue; and such rule, if entered against the sheriff or coroner of the city or county of Dublin, shall be a two-day rule, and in other cases a four-day rule, after service. And in case the said sheriff, or other officer, shall not comply therewith, or show good cause against the said rule, an attachment shall issue, on production to the proper officer, of an affidavit of service of the said rule on the sheriff, or his returning officer, and non-compliance therewith; and this rule shall apply to a return *attachiari fecimus*, by a Tipstaff or Sergeant-at-Arms.

Rule when
to be en-
tered.

122. The rule to bring in the body may be entered against the sheriff who made the return during his continuance in office; but in case he shall have gone out of office, such rule shall be

entered against the sheriff in office at the time of its entry ; but the rule to bring in the money may be entered against the sheriff who made the return at any time during his continuance in office, and for six months after his going out of office, but not afterwards, except by order of the Court.

123. It shall be the duty of the sheriff, or other officer, immediately after executing any writ of execution, to return and file the same in the proper office.

Sheriff to return writ immediately after execution thereof.

124. Where a conditional rule for an attachment shall have been entered against any officer, he shall pay the costs of such rule.

Officer to pay costs of rule.

125. The officer with whom any writ shall be filed, returned by any sheriff, shall endorse thereon the day when it was so filed.

Officer to endorse day of filing of writ.

ATTACHMENTS.

126. All attachments shall issue (if in the Queen's Bench or Common Pleas) to the Tipstaff, or (if in the Exchequer) to the Sergeant-at-Arms, unless where the same shall have been awarded against a party in the custody of the Sheriff, in which case such attachment shall issue to the Sheriff, or where the same shall have been awarded against the Tipstaff, or Sergeant-at-Arms himself, in which case such attachment shall issue to the Marshal of the Marshalsea of the Four Courts ; and during the time that any such attachment against said Tipstaff or Sergeant-at-Arms shall be in force, all attachments which would otherwise have issued to the said Tipstaff or Sergeant-at-Arms shall issue to the said Marshal of the Marshalsea.

Attachments, to whom to be directed.

127. In all cases where an attachment shall have issued to the Tipstaff, Sergeant, Marshal, or Coroner, no consent or discharge from any attorney or his client only shall be of any avail, unless the fees to which such officer may be at the time entitled shall have been first paid ; and in case the party against whom such attachment was issued shall have been arrested thereunder, the Tipstaff, Sergeant, Marshal, or Coroner, shall not be obliged to discharge such party until his fees shall have been first paid, unless the Court shall order to the contrary.

Fees to be paid before discharge.

MOTIONS AND RULES.

128. No service of any rule or notice (including notice of bail) shall be valid, unless made before nine o'clock at night ; and the time specified in all rules requiring service shall begin to run from the day of service thereof.

Service of notice and rules. See R. G. H. T. r. 164.

A notice of motion served upon one of the days appointed to be kept as holidays by the C. L. P. Act, 1853, sect. 232 (other than a Sunday) is

Serving notice on holiday.

When motion postponed.

not a nullity ; but it would appear in such a case that the notice is to be considered as served upon the following day, and that therefore a notice of motion served on Whit Tuesday is not in time for the following Friday (*Smith v. Grant*, 6 Ir. Jur. O. S. 317). If served after nine o'clock at night the notice will be, it would appear, a nullity (*Anon*, 4 Law Rec. O. S. 206). Where a motion is ordered to stand over for a particular time, notice ought to be given to the opposite party of its coming on (*M'Kee v. M'Kee*, 6 Ir. Jur. N. S. 18) ; and, therefore, in every case moved in Chamber, and directed to stand over for the full Court, a notice of renewing the motion must be served (*Sullivan v. Sullivan*, 6 Ir. C. L. R. 523). If the notice, in place of stating that the application will be made upon the first opportunity, states that it will be made upon a particular day which has an impossible date, it will be irregular (*Tisdall v. Humphries*, 1 I. L. T. 64).

What notice should contain.

In addition to the several matters specified above, the notice of motion must, where it is sought to set aside proceedings for irregularity, point out specifically the irregularity complained of (119th G. O. post, *Martin v. Lane*, 10 Ir. C. L. R. Ap. 3; *Edgar v. Houston*, 7 Ir. Jur. O. S. 362). Where, however, a party moved to set aside a return made by a sheriff "as irregular and contrary to the usual and proper form," the Court set aside the return as being bad *ex facie* (*Coster v. Hopkins*, Ir. R. 1 C. L. 561). The notice should ask for costs, but if not asked for the Court may, in its discretion, award them (*Farrer v. Morris*, 7 I. C. L. R. 14). The documents, &c., on which the party moving relies must be mentioned in notice (*Bethem v. Fernie*, 6 Ir. Jur. O. S. 281). If the notice does not contain the name and registered residence of the attorney it will be defective (*Doyle v. Hammond*, 6 Ir. Jur. O. S. 293).

Copies of affidavits.

Together with the notice, copies of the affidavits to be used upon the motion must be served. When a copy of an affidavit relied on is not served it cannot be used, and the Court will refuse the motion with costs if the other affidavits relied on are not sufficient (*Robinson v. Blake*, 3 Ir. Jur. O. S. 96 ; *Mansfield v. Hackett*, 5 Ir. Jur. O. S. 46). The opposite party is entitled to take a copy of any exhibit relied upon in an affidavit (*Tebbutt v. Ambler*, 7 Dowl. 674). The attorney filing an affidavit must have a copy of it in Court ready for production and certified by him.

Withdrawing notice.

When a notice is served it cannot be withdrawn, except upon the terms of paying all costs properly and necessarily incurred up to the time it is withdrawn. Where a second notice was served withdrawing the first, the Court, before hearing the second notice, discharged the first with costs (*Lynch v. Craig*, 6 Ir. Jur. O. S. 264) ; and where pending a notice to set aside a defence the defendant filed a plea of confession, it was held the plaintiff was, notwithstanding, entitled to move (*Good v. Allen*, 6 Ir. C. L. R. 244). If the party serving the notice does not appear, the opposite party must have the notice struck out with costs, in order to entitle himself to his costs ; and for this purpose it will be necessary to have an affidavit of the service of the notice. When a motion has been refused, or "no rule" has been pronounced upon it, it cannot be renewed (*O'Brien v. Taylor*, 6 Ir. C. L. R. 124 ; *Hargreave v. Meade*, 9 Ir. C. L. R. Ap. 45).

Striking out.

Requisitions for rules.

129. All requisitions for rules and orders obtained in any of

said Courts, shall be lodged with the Clerk of the Rules on the day of obtaining such rule or order.

130. All rules and orders shall state at the foot thereof the christian names as well as the surnames of the respective attorneys, or in case of a firm, the usual title of such firm.

Christian and surname of attorney to be stated in rule.

131. It shall be sufficient to state in every notice of motion, that the same will be moved on the first opportunity; and all notices of motion shall be served two clear days previous to such motion being made; and all notices shall contain the name and registered residence of the attorney for the party serving the same, and also the name and registered residence of the attorney to be served; and in every notice of motion to show cause against, or vary an order, except to set aside a verdict or nonsuit, the grounds on which it is intended to show cause or vary the said order shall be set forth.

Notice of motion, what to state

132. No affidavit which shall not have been sworn and filed at the time of the service of the notice of motion, and shall not be so mentioned in said notice, shall be used on any motion, and on all motions the attorney filing such affidavit shall have in Court, ready for production, copies thereof, certified by him.

Affidavits to be filed when notice served

133. Every conditional order shall be served within one week from the day same shall be pronounced, unless further time be allowed by the Court; and in default thereof, such conditional order shall stand discharged.

Conditional order, when to be served.

If the conditional order be not served within the specified time, the Court cannot make an order that the officer shall receive an affidavit of service effected afterwards. In such cases the course to be adopted is to apply for a fresh order (*Goggin v. O'Reilly*, 6 Ir. Jur. O. S., 292). In *May v. May*, 13 Ir. C. L. R., Ap. 36, it seems to have been considered that in case of a fatality the Court might dispense with service within the specified time.

As to making the conditional order absolute in case no cause is shown, see the 136th G. O. *post*, and as to the proceedings to be taken when cause is shown, see the 134th and 135th G. O's.

134. Where a conditional order shall have been obtained, and an affidavit shall have been duly and in due time filed for showing cause, and notice thereof duly given, such affidavit and notice shall be good cause against making the conditional order absolute, unless the party obtaining such conditional order shall, within six days after notice of the filing of such affidavit and due notice thereof, give notice of applying to the Court to make the conditional order, or some part thereof, absolute, and shall move such notice according to the course of the Court; and if such notice be not given, and moved within the time aforesaid, the party on whose behalf such affidavit has been filed, provided he has been

Mode of discharging conditional order when motion to make absolute not made.

served with the conditional order, shall be entitled to a side-bar rule, allowing the cause shown against the conditional order, as an authority for taxing the costs of making and filing such affidavit, and giving notice thereof, and such costs shall be taxed accordingly. This order, however, not to extend to conditional orders to confirm an award or Master's report, or to set aside a verdict or nonsuit, or to arrest judgment.

When a party files affidavits for the purpose of showing cause against a conditional order, he should not serve notice of motion, and the service of a notice in such a case will be an irregularity (*O'Donnell v. O'Donnell*, 3 Ir. C. L. R. 29). Where, however, a garnishee served notice of showing cause, he was held entitled to begin, although the judgment creditor subsequently served notice of motion to make absolute (*Gilmour v. Simpson*, 8 Ir. C. L. R., Ap. 38).

When notice of the filing of an affidavit for the purpose of showing cause is served upon the party who obtained the conditional order, he must serve notice of motion to make absolute, within six days after notice of filing (*Vint v. Langtree*, 1 Ir. L. T. 279). The party obtaining the order will not as a general rule be allowed to support it by any affidavits or documents other than those on which it was obtained (*Byrne v. Chester and Holyhead Railway Co.*, 1 Ir. Jur. N. S. 511; *White v. Doolan*, 3 Ir. L. R. 500); he may, however, be permitted to use affidavits in reply (*O'Donnell v. O'Donnell*, 5 Ir. Jur. O. S. 107).

Showing
cause where
no affidavit
filed.

135. Where a conditional order shall have been obtained, and no affidavit shall be filed as cause, but notice of motion to show cause shall be served within the time limited by the conditional order, the party serving such notice shall, within the time aforesaid, file an affidavit of the due service of such notice, and bring forward and move such motion according to the course of the Court; and in case the notice to show cause shall be discharged, the order shall be made absolute.

The notice in such cases should specify the grounds upon which it is intended to show cause against the Order. 131st G. O. ante.

Making ab-
solute, when
no cause
shown.

136. Where a conditional order shall have been obtained, and no affidavit shall be filed, or notice of showing cause served within the period limited by the conditional order, on an affidavit being filed of the due service thereof, and a certificate of no cause, the same shall be made absolute in the office, unless the Court shall have otherwise directed by the conditional order.

When a particular time is mentioned in a conditional order, and it is not made absolute within that time, the opposite party has the intervening time until the order is made absolute to show cause. The time in a conditional order speaks from the date of its being made absolute (*Divine v. Divine*, 6 Ir. Jur. N. S., 383).

137. Every conditional order for an attachment shall be served personally on the party against whom such order may be made, except in the case of Sheriffs or other officers, when service on the Returning Officer shall be sufficient, unless otherwise directed by the order in either of the above cases.

Conditional orders for attachment to be served personally.

138. Where costs shall have been awarded by any order, and no sum therein named, the party entitled to such costs shall be at liberty to issue execution for the same on production of the original order and the officer's certificate of taxation.

Execution for costs awarded by order.

CONSENTS.

139. Consents for judgment, and consents to submit matters in the cause to arbitration, may be made Rules of Court by side-bar rule, but all other consents shall be moved in Court.

Consents for certain matters may be made rules of Court by side-bar.

AFFIDAVITS.

140. Every affidavit shall be entitled in the Court in which the same is to be used, and shall contain the addition and residence of the person making the same.

Affidavits, how entitled. R. G. H. T. 1853, r. 138.

The affidavit must be entitled in the Court (*Molling v. Poland*, 3 M. & S. 157). It must also be entitled in the cause, and both the christian names and the surnames of the parties must be stated (*Anderson v. Baker*, 3 Dowl. 107; *Chaffers v. Bingham*, 1 Jebb. & Sym. 527).

141. In every affidavit the deponent shall sign his name or mark on the left-hand side of the affidavit, and the jurat shall be on the right-hand side; and if the affidavit be made by two or more persons, their names shall be severally mentioned in the jurat, and no affidavit shall be received in which there shall appear to be either interlineation or erasure, unless the same be noticed in the jurat, or initialed by the officer; and no interlineation or alteration shall be allowed in the jurat, unless it be in the handwriting of the person before whom such affidavit is sworn; and every affidavit to hold to bail, and every affidavit in a cause or matter, shall be signed by the attorney for the party filing it, when the said party shall have an attorney, and no affidavit shall be deemed sufficient if made before the party's own attorney in the cause, or before his clerk.

Affidavits, how to be signed, and erasures to be noticed.

The jurat must contain the several matters specified in the 143rd and 145th G. O.'s post. It must also set forth the place and county where sworn (4 Wm. & Mary, ch. 4, sect. 4; *Pick v. Horan*, 2 Ir. Jur. N. S., 460; *Taunton v. Mahon*, 3 Ir. Jur., O. S. 359); and the date of swearing (*Ivie v. Phelan*, 4 Law. Rec. O. S. 123); and it must be signed by the

commissioner before whom it is sworn (*Champion v. Donnelly*, 2 Ir. Jur. N. S. 264).

When the jurat is defective the affidavit is irregular and cannot be used. The Court may however adjourn the motion to allow the defect to be amended (*Alexander v. Alexander*, 2 Ir. Jur. N. S. 493 ; and see *Birch v. Somerville*, 2 Ir. C. L. R. 67, 69).

As to defects in the copy of an affidavit furnished with a notice of motion, see the note to the 148th G. O. *post*.

Affidavits,
how to be
written.

142. All affidavits shall be legibly written or printed bookwise on post paper, leaving a margin on the left-hand side of the front, and the right-hand side of the reverse, of at least two inches ; and no officer shall receive or allow to be sworn any affidavit in which there shall be any unreasonable amount of interlineations or erasures ; and in all cases where any attorney shall have prepared a copy of any affidavit for attestation, it shall be the duty of the person attending to file such affidavit, to assist the officer in comparing such copy, before the same shall be attested.

Certificate
when
deponent is
illiterate.
R. G. H. T.,
1858, r. 141.

143. Where any affidavit is made by any person who from his signature appears to be illiterate, or who is blind, the commissioner taking such affidavit shall certify or state in the jurat that the affidavit was correctly read in his presence to the party making the same, and that such party seemed perfectly to understand the same ; and also that the said party wrote his name, or made his mark, in the presence of the commissioner taking the said affidavit. And all commissioners shall guard against interlineation or erasure as much as possible in affidavits ; but should such be unavoidable, the same must be fully detailed in the jurat. And all commissions to be issued after the date of this order shall contain these directions, in addition to the instructions usually inserted in such commissions.

Commissions
for taking
affidavits,
&c., to be
enrolled.

144. All persons appointed Commissioners for taking affidavits or special bail in Ireland, or elsewhere, shall enter and enrol their respective commissions with the Clerk of the Rules of each Court, previously to their acting in any manner under the same.

Certificate as
to knowledge
of deponent.

145. All commissioners for taking affidavits, and officers of the Court, shall certify in the jurat of every affidavit taken by them, either that they know the deponent himself, or some person named in the jurat who certifies his knowledge of the defendant.

Affidavit
sworn
abroad how
to be
authenti-
cated.

146. When any affidavit intended to be used on any proceeding in any of the said Courts shall have been sworn before a judge in England or Scotland, the judge's signature to the jurat shall be verified by affidavit ; and if sworn before any other person, except a commissioner appointed for taking affidavits in England or Scotland, the signature of such person to the jurat, and his

authority to administer oaths and take affidavits, shall be verified by affidavit, or by the certificate of a Notary Public.

147. All applications to refer affidavits for prolixity, scandal, or impertinence, shall be made by motion, without notice, grounded on the certificate of Counsel.

Reference of affidavit for prolixity, &c.

148. All affidavits, documents, or proceedings, filed in any of the offices of the said Courts, of which it shall be necessary to serve notice, and deliver copies, pursuant to the statute 13 Vic., c. 18, s. 44, shall be considered as filed only on the day of such service and delivery.

All documents to be considered as filed as of day of notice.

In serving copies of affidavits to be used upon motions, care must be taken that the copy served is a full and complete copy. An omission of the jurat is a fatal omission (*Synan v. Moriarty*, 1 Ir. C. L. R., 496); and the filing of an affidavit in reply to such affidavit does not preclude the party taking advantage of the informality (*Birch v. Somerville*, 2 Ir. C. L. R., 67).

REMOVAL OF SUITS (EXCEPT REPLEVIN) FROM INFERIOR COURTS.

149. No Writ of *Habeas Corpus cum causa* shall issue for the purpose of removing any action or suit before judgment from any inferior Court of Record into any of the said Courts; but the mode of removing such action or suit, except replevin, shall be by writ of *certiorari*, which shall be issued by the proper officer on production of an affidavit that the same is not sought for the purpose of vexation, oppression, or delay, but *bona fide*, and without collusion.

Certiorari to remove suits from inferior courts of record.

150. On the filing of a writ of *certiorari*, with a return thereto, when the same shall have been issued by the defendant, the plaintiff may, whether in Term or Vacation, file a summons and plaint against the defendant, in the Court in which such *certiorari* is returnable; and in default of defendant's filing a defence within eight days after service of the notice of the filing of such summons and plaint, the plaintiff, on a certificate of no defence, may have judgment thereon; and the Taxing Officer shall tax the plaintiff's costs, as well in the inferior as in the superior Court. And in no case shall a *procedendo* issue, except by order of the Court on motion upon notice; and no rule for bail in the Superior Court shall be entered.

Proceedings after return of certiorari.

151. In case the Judge or Officer presiding in the inferior Court shall not return the writ of *certiorari* within the time limited thereby, a side-bar rule may be entered, that such Judge or Officer shall return the writ within two days after service, or that an attachment shall issue. And in case he shall not accor-

Rule to return certiorari.

dingly return the writ, or show cause against the rule, an attachment shall issue, on the production to the proper officer of an affidavit of the service of such rule, and of the non-compliance therewith.

Time when
summons
and plaint to
be filed.

152. Where the writ of *certiorari* shall have been issued by the plaintiff and returned, or by the defendant, if the plaintiff shall not file a summons and plaint in the superior Court, within two months from the time of the return of the writ, exclusive of the holydays in the 232nd section of the Common Law Procedure Amendment Act (Ireland), 1853, the defendant may enter the Rule authorized by the 38th section of the said Statute.

REMOVAL OF PRISONERS.

Affidavit to
ground ha-
beas corpus,
contents of.

153. No writ of *Habeas Corpus* shall issue to remove any defendant from the custody of any Sheriff or Coroner, for the purpose of having such defendant committed to the custody of the Marshal of the Marshalsea, unless an affidavit shall be made and filed by the attorney employed to sue out such writ of *Habeas Corpus*, stating on whose behalf such writ shall be applied for, and the particulars of the several writs under which such defendant shall be detained in custody, and that the application for such writ of *Habeas Corpus* is made *bona fide* on behalf of such defendant, and without any collusion on the part of the plaintiff in any such writ, or any third person whomsoever; and when any application shall be made for such writ of *Habeas Corpus* on behalf of the plaintiff in any writ under which any defendant shall be detained in custody, or on behalf of any third person, such writ shall not be granted unless upon order made by the Court, grounded upon affidavit, setting forth the reasons for making such application, and the grounds on which it is desired such writ should issue.

Notice of
committal to
the Clerk of
the Rules
and Marshal.

154. Where any defendant shall be brought up under any writ of *Habeas Corpus* to be committed to the custody of the Marshal of the Marshalsea of the Four Courts, due notice thereof shall be given to the Clerk of the Rules and to the Marshal, that they may attend to have the said defendant committed; and the said defendant shall be committed by the Clerk of the Rules accordingly.

Committal
book to be
kept in rules'
office.

155. Where a defendant shall have been committed by any of the said Courts under a writ of *Habeas Corpus*, he shall thereupon stand committed under every writ mentioned in the return of such writ of *Habeas Corpus* without any rule; but a memorandum shall be entered in a book, to be kept for that purpose by the Clerk of the Rules, stating the committal, and the particulars of the writs under which the defendant stands committed.

SUGGESTIONS.

156. In all cases within the 147th section of the Common Law Procedure Amendment Act (Ireland), 1853, the plaintiff may, as of course, enter a suggestion without any rule; and in all other cases where a suggestion may be necessary, save when otherwise provided for by the said Act, an application shall be made to the Court by motion on notice to all parties who have appeared in the action, or their representatives; and all suggestions shall be prepared and signed by Counsel, and the Taxing Officer shall allow a fee to him for preparing same.

Suggestion
how to be
entered.

The construction of this order was discussed in *M'Mahon v. Ellis*, 12 Ir. C. L. R. 437, where it was held that it was not necessary in cases within the 156th sect. of the C. L. P. Act, 1853, to obtain the leave of the Court before filing the suggestion prescribed by that section; and it would appear that the order in question does not apply to the several suggestions which a party is enabled to enter, pursuant to the provisions of the C. L. P. Act, 1853, in case of the death, &c., of any of the parties to the record. These suggestions may therefore be entered, as of course, in all cases, except where the Act provides that the leave of the Court shall be first obtained, and in such case the application may be made *ex-parte*. In all other cases however the leave of the Court must first be obtained.

Sometimes a suggestion is traversable or may be demurred to; sometimes not. It is not easy to lay down any general rule upon the subject. In some cases it is expressly provided by statute that a suggestion shall not be traversable, as for instance in the several cases where suggestions of the death of the parties in proceedings in error are allowed to be entered under sections 183-186 of the C. L. P. Act, 1853. When the matter of the suggestion belongs to the Court, and has to be determined by it, as for instance in the case of a suggestion under section 196 of the C. L. P. Act, 1853, for the purpose of changing the venue in ejectment, the suggestion cannot be traversed. In such cases the suggestion should in general be followed by a confession, or *nient dedire*. See *Barnewall v. Sutherland*, 9 C. B. 380, 391, per cur. On the other hand, when a suggestion is made for the purpose of introducing a new party upon the record, and so creating a new liability, or a new right, the suggestion is traversable (*Bartlett v. Penland*, 1 B. & Ad. 704; and see *Barnewall v. Sutherland*, *ubi supra*).

157. The 147th section of the Common Law Procedure Amendment Act (Ireland), 1853, shall be applicable to the case of a first or original suggestion of breaches, as well as to the case of a further or additional breach.

Original
breaches
may be sug-
gested.

CASE FROM COURT OF EQUITY.

CASE UNDER 16 AND 17 VIC., CAP. 113.

Case stated,
how to be
set down.

158. Where a case shall have been sent from a Court of Equity to any of the said Courts for their opinion, or where a case shall have been agreed upon under the Common Law Procedure Amendment Act (Ireland), 1853, the party having the carriage of the order shall proceed to make up books for the Judges, and set down the case for argument, in the same manner as directed by the 50th Rule with reference to demurrers.

REFERENCE TO THE MASTER.

Master's
entry book
to be kept
as to re-
ferences.

159. The Master shall keep a book, to be called the "Master's Entry Book," in which shall be entered, under proper dates from day to day, all references before him, specifying the meetings thereon, and the Counsel, Attorneys, and parties who may appear before him, and to which he shall add, in his own writing, the points ruled, or opinions finally expressed by him, so that such book may afford a clear record of the proceedings before him, and prevent any doubt as to what may have been disposed of at any previous meeting, and on all occasions, when it shall be deemed necessary, such book shall be produced in Court.

Mode of
proceeding
on re-
ference.

160. The arrangement and regulation of the course of proceeding under each reference shall be wholly subject to the control and direction of the Master, and he shall proceed with the reference made to him as speedily as the nature thereof, and the business of the office will allow, and shall continue the attendance upon each summons from hour to hour, and from day to day consecutively, but so as not to cause unreasonable delay in other matters; and on every adjournment fixed from time to time by the Master, the parties shall attend without a further summons, unless the Master shall otherwise direct; and the Master may also proceed *ex-parte* in case of non-attendance, after summons or notice, of any person bound or entitled to attend, provided the matter of the reference will admit of that course.

Proceeding
ex-parte.

When pro-
ceedings ad-
journd,
costs of the
day may be
given
against
party in
default.

161. Where by reason of the non-attendance of any party, or of one or more of the attending parties not being fully prepared, the Master shall be unable to proceed at the time appointed by him, and shall not deem it expedient to proceed *ex-parte*, he shall be at liberty to order such sum for the costs of the day as he shall think reasonable to be paid by the person in default, or by his attorney personally, as the Master in his discretion shall think fit; and in case the same shall not be paid on demand, the party entitled to such costs, on producing to the Clerk of the Rules the certificate of the Master stating the amount of such

costs, and by whom and to whom the same are to be paid, and an affidavit of demand and refusal to pay, may enter a side-bar rule that the amount of the said costs, and the costs of the rule shall be paid by the party liable thereto.

162. A copy of every order whereby any matter is referred to the Master, shall be lodged in his office for the purpose of the reference; and if the party who has the carriage of the order shall not proceed thereunder with due diligence, the Master shall be at liberty, upon a summons being issued by any person interested in the subject of the reference, to commit to such person the carriage of the order, and such person shall from thenceforward have the carriage thereof.

Order of reference to be lodged with Master.

163. All charges and discharges shall be signed by the party filing the same, and the contents thereof shall be verified by the oath or affirmation of such party, unless the Master under special circumstances shall deem it proper to order the same to be filed upon the signature and oath of any other person, or without signature and oath; and all such charges and discharges shall be filed within such time as the Master shall direct.

Charges and discharges to be verified.

164. Whenever the discharge of any party to any charge shall not be filed within the time allowed for that purpose, the party filing the charge shall be at liberty to issue a summons, and proceed on the charge.

If discharge not filed, mode of proceeding.

165. After a charge and discharge shall have been filed, either party shall be at liberty to issue a summons for proceeding thereon.

Summons to proceed on charge and discharge.

166. The Master shall be at liberty, if he shall think fit, to examine on oath, *viva voce*, the parties to any reference, and any person interested therein, and any witness produced; and a *subpoena* for the attendance of any witness before the Master shall be issued by the Clerk of the Writs as required; and the evidence of such party, person, or witness in all cases shall be taken down at the time by the Master, and preserved in the Master's Office, in order that same may be used if necessary.

Master may examine *viva voce*.

167. All affidavits which have been previously made and read in Court upon any proceeding in a cause or matter, may be used before the Master; and upon every inquiry before him it shall be in his discretion to determine what further affidavits (if any) shall be received.

Affidavit filed in the cause may be used.

168. When any party complains of any matter introduced into any charge, discharge, or other document before the Master, on the ground that it is impertinent, prolix, or scandalous, the same shall be brought before the Master by notice, specifying the particular passages objected to; and such party shall be at liberty forthwith to issue a summons for the Master to examine into such matter, and the Master shall have authority, without further rule or order, to expunge any such matter which he

Prolixity, &c., in document may be inquired into.

shall find to be impertinent, prolix, or scandalous ; and if the Master shall find the same not to be impertinent, prolix, or scandalous, he shall make an entry in his book to that effect, and the costs of such summons shall be in the discretion of the Master, and shall be enforced in the manner directed by the 161st rule.

Report,
contents of.

169. The Master's report on a reference shall specify any charge and discharge upon which the parties may have proceeded before him, and shall contain a schedule of the evidence adduced on both sides.

Master may
open refer-
ence on
terms.

170. The Master shall be at liberty to receive further evidence as to any new matter depending before him, notwithstanding he may have issued his summons to settle his report, and shall be at liberty in every such case to order such sum for costs as he shall think reasonable to be paid by the party producing such further evidence, or in consequence of whose proceedings such further evidence may have been required ; and in case such costs shall not be paid on demand the party entitled to same may recover such costs in the manner mentioned in the 161st rule.

Rule to con-
firm report.

171. The Master's report, when settled, shall be engrossed, and when signed, shall be filed ; and on production of a certificate of the filing thereof, the party may enter a rule to confirm such report, unless cause in four days after service of the said rule, and the mode of showing cause against the conditional order to confirm the Master's report shall be the same as directed by rule 174, in the case of showing cause against a conditional order to confirm an award, *mutatis mutandis*.

Notice to
show cause,
to state
grounds.

172. Every notice of motion to show cause against a conditional order to confirm the Master's report, or to set aside or vary such report, shall specify the grounds on which it is intended to appeal against such report.

AWARD.

Confirming
and enfor-
cing awards.

173. Where any matters shall have been referred to arbitration pursuant to statute 10 William III., c. 14, and an award shall have been made, the party desirous of enforcing the same shall, before the last day of the term next ensuing the publication of such award, enter a side-bar rule to confirm the same, unless cause in six days after service of the award and order ; and if no cause be shown, such rule may be made absolute on production to the officer of an affidavit of such service, and thereupon a demand of performance of the award shall be made by notice ; and in case it shall be necessary, the party seeking to enforce the award shall be at liberty to apply to the Court, on affidavit, stating the orders, services, and demand, hereinbefore specified, and the non-compliance therewith for an attachment, or for an order for payment of the amount awarded ; and such order shall

be made accordingly, and shall be absolute in the first instance, and shall specify the time within which such award shall be performed or money paid.

The period for confirming an award under this section is limited to the last day of the term next ensuing after the publication of the award; and the word, "term," does not include the immediate subsequent vacation (*Moore v. Moore*, 5 Ir. C. L. R., 94, 311).

As to a demand of performance, see *Sykes v. Hague*, 2 Scott, 193.

174. Where any party shall have been served with a conditional order to confirm an award, if he mean to show cause against the same he shall, within the time limited by the order, serve notice of motion for that purpose, which notice shall specify the grounds of objection to the award, and any affidavit or other documents he may intend to rely upon; and he shall proceed to move such notice according to the course of the Court; whereupon the party who has obtained said conditional order may file any affidavits in answer, or give notice of relying on any documents he may think fit to oppose the said motion.

Showing cause against confirmation of award.

It will not be sufficient if the notice merely states that the award is not final. The party showing cause will not be permitted to go into anything which does not appear in his notice, or on the face of the award itself (*Wilson v. Doolan*, 5 Ir. Jur. O. S., 135).

175. Where matters shall have been referred to arbitration by a consent at a trial, after the jury shall have been sworn, containing a provision that the award shall be entered as the verdict of the jury, the Judge's Registrar shall, on production of the award, and an affidavit of the perfection thereof, endorse the *postea* upon the abstract for *Nisi Prius* accordingly, whereupon judgment may be marked and execution issued as upon a verdict in ordinary cases.

Award to be entered as verdict of jury in certain cases.

176. No consent to arbitration signed solely by the attorneys in a cause shall be made a rule of Court, if the same be conversant of other matters than those in the cause in which they are attorneys; without prejudice to any more enlarged consent being entered into in open Court before a Judge of *Nisi Prius*, and subsequently made a rule of Court.

Attorney to refer matters in the cause only to arbitration.

COMPROMISE.

177. Where in any action or proceeding a compromise shall have been pending, unless when the same shall have been by parol, no further proceedings shall be taken by either party without first entering and serving a rule for liberty to proceed, compromise being off.

Rule to proceed, compromise off.

As to the distinction between mere negotiations and a compromise pending, see *Hanbury v. Jones*, 15 Ir. C. L. R., 442; *Riddall v. Crawley*, Ir. R. & C. L. R., 4; and see *Parker v. Bell*, 2 Ir. Jur. N. S. 330.

CONTINUING PROCEEDINGS BEFORE FINAL JUDGMENT.

Continuance of proceedings after a year and a day. See R. G. H. T. 1853, r. 176.

178. Where after defence filed, and before final Judgment shall have been marked, no proceeding shall have been taken in any action for one year and a day, by either plaintiff or defendant, and no compromise shall be depending, neither party shall be at liberty to proceed until he shall have served on the opposite party a rule for liberty to proceed, unless cause in eight days after service; and such rule may be obtained in the office at any time within two years from the last proceeding, on an affidavit of the facts; but after the lapse of two years the party requiring such rule shall serve notice of motion, and apply to the Court for same.

The General Order does not apply to cases where more than a year and a day has elapsed since the service of the summons and plaint without a defence having been filed, and the plaintiff is desirous of marking judgment. As to the course to be adopted in such cases, see *ante*, p. 36. A defendant may also file his defence although no proceeding has been taken for a year and a day without entering a rule under this section (*Graves v. Mercer*, Ir. R. 5 C. L. 107).

In other cases if either party is desirous of proceeding, he must serve the rule or notice of motion as the case may be, prescribed by the above order. In *Killinger v. Butler*, 6 Ir. C. L. R. 384, it was held that although the notice of motion for liberty to proceed after the lapse of two years may be served on the opposite attorney, yet the Court will, when the notice is served, give a conditional order only, which must be personally served upon the party. If, however, the notice of motion is personally served upon the opposite party the order will be absolute in the first instance (*Goodman v. Goodman*, 2 Ir. Jur. N. S. 232).

When leave to proceed is sought for after the lapse of several years, the delay which has taken place must be accounted for. Want of means is not *per se* a sufficient excuse; a reasonable and probable cause for the success of the suit must be shown (*Kennedy v. Gregg*, 4 Ir. C. L. R. 132); and if it appears that the opposite party has been prejudiced by the delay—as, for instance, if several of his witnesses have left the country, leave will be refused (*O'Callaghan v. O'Callaghan*, 12 Ir. C. L. R. Ap. 46).

Where, however, the delay is not attributable to the party applying for leave, as, for instance, where an order to stay the proceedings had been obtained by the opposite party, the result will be different (*Kelly v. Slator*, 8 Ir. Jur. N. S. 92); and *c.f.* *Gardiner v. Feuge*, 5 Ir. Jur. N. S. 241.

The provisions of the order are applicable where a defendant serves notice of trial by *proviso* (*Gardiner v. Gardiner*, 14 Ir. C. L. R. Ap. 31). In such cases it is not a ground for discharging the order that the defence put forward by the defendant, and on which he seeks to go to trial, is not a meritorious one (*Marsh v. Williams*, 7 Ir. C. L. R. 99).

As to what is a "proceeding" within the meaning of the order, it would appear that the order does not apply where the party merely moves to set aside proceedings (*Lumley v. Flompson*, 6 Dowl. 558); neither does it apply to proceedings after verdict (*Newton v. Boodle*, 3 C. B. 795). It does, however, apply where a plaintiff seeks to execute a writ of inquiry after the lapse of a year and a day from the recovery of an interlocutory judgment (*Peyton v. Burdus*, 2 Str. 1100).

SETTING ASIDE PROCEEDINGS FOR IRREGULARITY.

179. No application to set aside proceedings for irregularity shall be allowed, unless made within a reasonable time; nor if the party applying, or the opposite party, have taken a fresh step after knowledge of the irregularity; and every notice of such motion shall point out the irregularity complained of.

Application to set aside proceedings, not after step taken.
R. G. H. T.,
1853, r. 135,
136.

As to setting aside proceedings for irregularity, see sects. 16 & 231 of the C. L. P. Act, 1853, and the notes thereto.

Applications to amend pleadings are not within the order (*Welsh v. Hall*, 9 M. & W. 14).

PROCEEDINGS IN *FORMA PAUPERIS*.

180. At any time, whether before or after the commencement of an action, the Court may allow any part to remove into such Court any proceeding from an inferior Court, and prosecute or defend same in *forma pauperis*.

Liberty to sue or defend when obtained.

181. Every application for liberty to sue in *forma pauperis* shall be by motion without notice, grounded on affidavit, stating the cause of action, and that the party is unable from poverty to prosecute or defend, or remove and proceed with the action (as the case may be), and so detailing his circumstances that the Court may be enabled to judge of the grounds of such statement as to poverty, and shall be accompanied by the certificate of Counsel, that in his opinion the party has a good cause of suit or defence; and if such application be made before action brought or cause removed, the same shall be by petition, verified by affidavit.

Grounds of application.
See R. G. H. T.,
1853, r. 121.

182. In all cases not within the statute 10 Car. 1., sess. 2, chap. 17, s. 2, in case the Court shall think the conduct of a party suing or defending as a pauper vexatious or improper in any proceeding, it may order that he shall pay the costs of such proceeding, or that his proceedings be stayed until such costs shall have been paid.

Costs may be awarded against pauper for vexatious conduct.

183. An order giving permission to prosecute or defend, or remove any suit in *forma pauperis*, shall not be deemed an authority to prosecute, or defend, or remove any suit except the particular suit specified.

Order to relate to particular suit only.

EJECTMENT.

Upon whom summons and plaint in ejectment on title, to be served. 184. The writ of summons and plaint in ejectment on the title shall be served on every person in possession of the lands sought to be recovered, or any part thereof, or in receipt of the rents and profits of the same, or any part thereof, or who shall claim to be entitled to the present receipt of the same, or of any part thereof.

Contents of affidavits of service of ejectment on title, to be served. 185. In every affidavit of service of a writ of summons and plaint in ejectment on the title, it shall be stated that the deponent knows not of any person other than those who have been served, who is in possession of the lands sought to be recovered, or any part thereof, or in receipt of the rents and profits, or any part thereof, or claiming to be entitled to the present receipt of the same, or any part thereof, and which statement shall be verified by the affidavit of the attorney of the plaintiff, and also of the person, or one of the persons by whom he was employed to bring the ejectment.

Upon whom summons and plaint in ejectment for rent to be served. 186. The writ of summons and plaint in ejectment for non-payment of rent, shall be served on the tenant under the lease or instrument sought to be evicted and his assignee, and on every person in possession, or in receipt of the rents and profits of the premises sought to be recovered, or any part thereof; and also on any mortgagee of such premises, whose mortgage shall have been registered within six calendar months from the perfection thereof; and also the assignee of any such mortgagee, whose assignment shall have been in like manner registered.

Contents of affidavits of service in ejectment for rent. 187. In every affidavit of service of the writ of summons and plaint in ejectment for non-payment of rent, it shall be stated that the deponent knows not of any person other than those who have been served, who is tenant under the lease or instrument sought to be evicted, or assignee thereof, or in possession or receipt of the rents and profits of the premises sought to be recovered, or any part thereof; or mortgagee thereof whose mortgage has been registered within six calendar months from the perfection thereof, or assignee of any such mortgagee whose assignment hath been in like manner registered, and which statement shall be verified by the affidavit of the attorney of the plaintiff, and by the person, or one of the persons, by whom he was employed to bring the ejectment.

Writ, how to be served. 188. The writ of summons and plaint in ejectment may be served personally on any party to be served therewith, wherever he may be found within the jurisdiction, or at his usual place of residence, wherever it may be within the jurisdiction, on his servant, or on his wife, child, or other member of his family, being an inmate of the house, and aged sixteen years and upwards; and in all cases where such service shall not have been

effected, an application may be made to the Court to substitute service, or have any service already made deemed good.

189. The writ of summons and plaint in ejectment may be served at any time while the writ shall be in force, as in the case of any other writ of summons and plaint.

Writ when to be served.

190. The Taxing Officer shall be at liberty to allow a fee to counsel upon a case to advise as to parties or otherwise, previously to the institution of any action of ejectment, wherever he may consider such case to have been necessary.

Case and fee to Counsel to advise may be allowed.

191. All General Rules herein contained shall extend to ejectment (unless where the same shall not be applicable), *mutatis mutandis*.

General rules to extend to ejectment.

REPLEVIN.

192. When any action of Replevin shall have been commenced in any inferior Court, the mode of removing the same into any of the superior Courts shall be by the writ of *recordari facias loquelam*, according to the form in the 3rd schedule to these Orders, and the mode of proceeding under the said writ shall be the same as prescribed by the 150th and following order, in the case of the writ of *certiorari*.

Removal of replevin from inferior courts.

193. All General Rules herein contained shall extend to replevin (unless where the same shall not be applicable), *mutatis mutandis*.

General rules to extend to replevin.

ERROR

194. No practising attorney, or clerk, or apprentice to a practising attorney, shall be bail in error without the leave of the Court.

No attorney to be bail in error.

195. Two days' notice of bail in error shall be given before the time for putting in such bail.

Notice of bail.

196. In case of assignment of error, notice of filing thereof and other pleadings in error shall be served by the party filing the same, and with such notice a true copy of such assignment or other pleading shall be delivered; and every such assignment or other pleading shall be considered as filed only on the day on which such notice shall be served, and copy delivered; and every such assignment and other pleading in error shall be signed by counsel and attorney.

Notice of filing assignment of error.

197. The proceedings as to making up the paper books, and setting down the case for argument, shall be the same as in cases of demurrer, as directed by the 50th rule.

Books for argument, see R. G. H. T. 1853, r. 68.

When the plaintiff in error after having lodged the paper books neglects to set the cause down for argument, the defendant may do so, and an application on behalf of the defendant for leave to mark final judg-

ment on the grounds of the cause not having been set down, will therefore be refused (*Scott v. The Midland Great Western Railway Co.*, 6 Ir. Jur., O. S. 1). When the plaintiff in error neglects to make up the paper books, the defendant should not apply to the Court below to set aside the proceedings (*Doolin v. Doolin*, 7 Ir. Jur. N. S., 34). In such a case the application should be made to the Court of error.

Upon the argument of a case in the Court of error the senior counsel for the plaintiff begins, and is followed by the junior on the same side. The senior counsel on the other side is then heard, and is followed by his junior, and the counsel opening has the general reply (*Roddy v. Fitzgerald*, 7 Ir. C. L. R., 142 n; *Holmes v. Smith*, 8 Ir. C. L. R., 425 n.).

Contents of
books for
Judges.

198. All paper books for the Judges on proceedings in error shall contain a copy of the record and suggestion or assignment of errors, and the pleadings, if any, thereon, with the names of the counsel and attorney, and a statement signed by counsel for each party of the points intended to be argued, and shall have endorsed thereon an index denoting the page at which each document commences, and shall be fully noted in the margin.

Issues in fact
in error, how
to be pro-
ceeded with.

199. In cases of error in fact, when issue in fact shall be joined, the proceedings with respect to the trial of said issue shall be the same, *mutatis mutandis*, as in case of any other issue in fact; and on producing the *postea* to the proper officer, he shall mark judgment for the party who has obtained the verdict, and when issue in law shall be joined in such proceeding in error the proceedings shall be the same as on the argument of demurrer in ordinary cases.

Error not to
be brought
for costs only

200. In no case shall error be brought for any error in a judgment with respect to costs only, until after application to the Court in which such judgment may have been given, to amend the judgment in that respect.

Costs of
error to be
costs in the
cause, R. G.
H. T. 1853,
r. 69.

201. The costs of proceedings in error shall be taxed and allowed as costs in the cause.

This order only provides for the mode of taxation of costs, and does not entitle a party to costs where formerly they would not have been awarded to him (*Fisher v. Bridges*, 4 El. & Bl. 666). Neither will he be entitled to them under sect. 169 of the C. L. P. Act, 1853, which provides that proceedings in error shall be a step in the cause. Before this order the costs should have been taxed in the Court of error and an application to review the taxation should likewise have been there made; and the object of the present order is to provide that the costs shall be taxed in the same way that ordinary costs are taxed.

The right of the parties to costs in error is founded upon 9 Wm. III. ch. 25, sect. 10; 9 Wm. III. ch. 10, sect. 2; and 6 Anne, c. 10, sect. 22. When the judgment of the Court below is reversed, there is no statutory provision, and each party consequently bears his own costs of the proceedings in error, but the party succeeding is entitled to have the judgment entered up awarding him the costs of the proceedings below.

Where, however, a judgment had for the plaintiff is reversed by the defendant for error in fact, the defendant is not entitled to include in the judgment of reversal the cost of defending the action (*Ievers v. Bainbridge*, 8 Ir. C. L. R. 150).

When the judgment of the Court below is affirmed, it may be laid down generally that the defendant in error is entitled to costs by virtue of the several statutes referred to above. Where after the death of a plaintiff in error the proceedings were continued by the devisee, it was held that the judgment of the Court below having been affirmed, he was only liable for the costs incurred after he was made a party (*Parker v. Tootal*, L. R. 1 Ex. 41).

NOTE—Beside the foregoing rules of practice, there are others in the body of the Common Law Procedure Amendment Act (Ireland), 1853, which are not repeated here, but which of course must be observed.

Dated 11th day of January, 1854.

THOS. LEFROY.
 JAMES HENRY MONAHAN. *leant*
 D. R. PIGOT. *cleapt*
 ROBERT TORRENS.
 P. C. CRAMPTON.
 N. BALI.
 J. D. JACKSON.
 RICHARD MOORE.
 RICHARD W. GREENE.

SCHEDULES TO WHICH THESE ORDERS REFER.

SCHEDULE I.

*Fees to be allowed to Attorneys on Taxation of Costs.**Instructions.*

	£	s.	d.
1 Instructions to proceed or defend in ordinary cases	0	6	8
2 Instructions to sue or defend, where a question of title to real property or an office, arises, (to be determined by the Taxing Master)	1	1	0

Letters.

3 Letter for payment, or to settle, and copy, if sent	0	3	6
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N.B.—Not to be allowed, unless sent a reasonable time before action commenced.

Writs and process.

4 Writ of summons and plaint, or capias	0	12	6
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N.B.—If over ten folios, to be increased at the discretion of the Master.

5 Summons in ejectment, and endorsement thereon	0	15	0
6 Replevin	0	10	0
7 Recordari	0	10	0
8 Attachment	0	10	0
9 Certiorari	0	10	0
10 Procedendo	0	10	0
11 Prohibition	0	10	0
12 Supersedeas	0	10	0
13 Memorandum of error	0	10	0
14 Habeas corpus ad testificandum	0	5	0
15 Subpœna ad testificandum for four witnesses or under	0	4	0
16 For each additional witness	0	0	6
17 Subpœna duces tecum	0	5	0

N.B.—If witnesses live at a distance from each other, Master may allow as many subpœnas as he may deem necessary.

	£	s.	d.
18 Commission for witnesses	0	12	6
19 Capias ad satisfaciendum	0	12	6
20 Fieri facias	0	12	6
21 Elegit	0	12	6
22 Revivor	0	12	0
23 Retorno habendo	0	10	6
24 Habere, facias possessionem, and notice thereon of rent due, where number of defendants does not exceed twenty	0	15	0
25 Ditto, for every additional twenty defendants or under	0	5	0
26 Ditto, and fieri facias or capias ad satisfaciendum for costs in one writ	0	18	0
27 Writ of possession, 1, 2 Will. IV., c. 31, s. 24, &c.	0	10	0
28 Writ of restitution	0	10	0
29 Levari facias, or other writ issued after final judg- ment not herein particularly specified	0	12	6
30 Writ of inquiry, fee on	0	6	8
31 Engrossing ditto, per folio	0	0	6
32 Abstract of Nisi Prius, first issues	0	13	4
33 For each additional issue (at the discretion of the Master), but not in any case to exceed £1	0	3	4

N.B.—A fee to counsel to be allowed on settling issues in proper cases.

34 Engrossing ditto, per folio	0	0	6
35 Writ of scire facias, fee on	0	10	0
36 Engrossing ditto, per folio	0	0	6
37 Notice in Gazette, &c., to corporations and public bodies, under Common Law Procedure Amend- ment Act (Ireland), 1853	0	5	0
38 Ditto, each copy	0	1	0

N.B.—The above fees to include all certificates at foot and endorsements, sealing, and all things requisite to complete the writ or process.

Appearance and Defence.

39 Appearance and defence	0	12	6
40 Drawing and engrossing particulars of set-off, five folios or under	0	5	0
41 If over five folios, draft per folio	0	1	0
42 Engrossing per folio	0	0	6

Term Fee.

	£	s.	d.
43 Term Fee	0	6	8

N.B.—To commence with summons and plaint and defence, and to end with final judgment. Not to be chargeable for plaintiff, unless an act in Court be done in the term. In cases where several separate pleas or defences are put in by the same attorney, one term fee only to be allowed for all.

Drafts, Engrossments, and Copies.

44 Drawing and engrossing any pleading of six folios or under, including suggestions on record, bills of exceptions, special verdicts, interrogatories, and summary of pleadings, &c., (to include instructions and copies for counsel, when employed)	0	10	0
45 If over six folios, for draft per folio	0	1	0
46 Engrossing ditto, per folio	0	0	6

N.B.—In cases of difficulty and importance, wherein the pleading is short, an additional compensation for instructions given counsel may be allowed, but within the rule as to cases for advice of proofs, post, No. 171.

47 Drawing and engrossing affidavit, when five folios or under	0	4	0
48 Drawing affidavit, per folio	0	0	6
49 Engrossing ditto, per folio	0	0	3
50 Drawing and engrossing petition, charge, or discharge, and copy, five folios or under	0	6	8
51 Drawing petition, charge, or discharge, per folio	0	0	6
52 Engrossing ditto, per folio	0	0	3
53 Drawing and engrossing recognizance, or bail-piece	0	6	8
54 Drawing assignment of judgments, ten folios or under	0	10	0
55 Engrossing ditto	0	10	0
56 Drawing and engrossing memorial of ditto	0	6	8
57 Drawing and engrossing satisfaction piece and affidavit	0	6	8
58 Drawing and engrossing submission or award, five folios or under	0	10	0
59 Ditto for each additional folio, for draft per folio	0	1	0
60 Engrossing ditto per folio	0	0	6

	£	s.	d.
61 Drawing and engrossing consent or undertaking, five folios or under	0	3	4
62 Ditto, for each additional folio for draft, per folio	0	0	6
63 For copy, per folio	0	0	3
64 Drawing and engrossing all necessary certificates, five folios or under	0	2	6
65 Ditto, for each additional folio or draft	0	0	6
66 For engrossing, per folio	0	0	3
67 Drawing and engrossing receipt for money or other matter, in a cause	0	2	6
68 Drawing deeds, or like instruments, not herein specially provided for, for each skin of fifteen folios	0	15	0
69 Engrossing ditto	0	15	0

N.B.—At the same rate for a greater or a less quantity.

70 Filling common bond and warrant	0	13	4
71 Drawing and engrossing any ordinary power of attorney	0	13	4
72 Copy deeds, under 64 sec. of 16 and 17 Vic. c. 113, per folio	0	0	6
73 Each necessary copy of summons and plaint in ejectment	0	2	6

N.B.—The attorney for the plaintiff shall verify the necessity of the service claimed as to each respective individual, to the satisfaction of the officer.

74 Drawing notice, six folios or under	0	4	0
75 Ditto, for each additional folio	0	0	6
76 Copy notice, six folios or under	0	1	0
77 Ditto, for each additional folio	0	0	2

N.B.—The officer to disallow all unnecessary notices.

78 Service of notice, rule, or order in Dublin on opposite Attorney	0	1	0
79 Certificate of description of defendant, &c., pursuant to statute 9 Geo. iv., c. 35, ss. 8, 9	0	2	6
80 Drawing report, including attendance on the master, &c., for instructions for his report, and drawing rough draft thereof and of schedules, for each folio, or concluding part of a folio, for so many as the signed report and schedules shall contain	0	0	6
81 Engrossing report and schedules, for each folio	0	0	3
82 Each copy of an ordinary writ, order, notice, consent, summons, or the like	0	1	0

	£	s.	d.
83 All copies of documents not herein otherwise provided for, including copies to be served under the statute, and for the use of the Court, and books for the Judges, for each folio . . .	0	0	2

N.B.—Parchment to be allowed for pleadings, summary of pleadings, &c., and other documents required to be filed on parchment.

Attendances.

84 Attendance and fee on side-bar rule, or to make order of Nisi Prius a rule of Court . . .	0	3	4
85 Attendance on each motion in Court, or in Chamber, not requiring notice . . .	0	6	8
86 Attendance on common motions on notice, day of hearing . . .	0	6	8
87 Attendance on new trial motions, trials by the record, or law arguments, day of hearing . . .	0	13	4
88 Attendance, while motion or cause in the list and not called on, or which not being listed is liable to be moved, each day . . .	0	3	4

N.B.—This fee not to be allowed for any day on which, by the practice of the Court, the motion or cause is not to be called on.

89 Attendance, to mark judgment . . .	0	3	4
90 Attendance, to satisfy judgment, including signing the roll . . .	0	6	8
91 Attendance, on writ of inquiry or inquisition, in Dublin . . .	1	1	0
92 Ditto, in the country . . .	2	2	0

N.B.—These fees to include all attendances for delivery and return.

93 Attending opposite party with draft abstract for approval or objection . . .	0	6	8
94 Attending Clerk of the Rules with draft abstract, etc., for Judge to settle issues . . .	0	6	8
95 Ditto, on record of Nisi Prius, in Dublin, day of trial . . .	2	2	0
96 Ditto, each succeeding day of trial . . .	2	2	0
97 Attendance on ditto, while cause in the list unheard, each day . . .	0	6	8
98 Assizes fee . . .	5	5	0
99 For each day of trial after the first . . .	2	2	0

	£	s.	d.
100 As between attorney and client, if the attorney employed at the trial be not a practitioner of the county, the client will be liable to pay him in lieu of the assizes fee, for each day necessarily occupied	2	2	0
101 Also his actual travelling and other expenses, or in lieu of them, per diem	1	1	0
102 Attendance on the sheriff, or his returning officer, coronor, or elisor, with writ and for return, or for assignment of bail or replevin bond	0	3	4
103 Attendance on registrar, with docket of abstract and copy of bill of particulars (with certificate of counsel, where requisite), and to enter cause for trial	0	6	8
104 Attendance and docket for registrar, of plea of confession or consent for judgment given, and that cause will not proceed to trial	0	3	4
105 Attendance for postea, if not filed on the proper day	0	3	4
106 Attendance to see cause set down for argument	0	3	4
107 Attendance on officer, with notice of motion	0	3	4
108 Attendance for, and filing first summons to go before judge, officer, or arbitrator	0	3	4
109 Attendance on judge or baron for order and fiat	0	6	8
110 Attendance and docket for judge or baron, with notice for new trial motion, or conditional order for setting aside verdict or non-suit, together with the necessary documents	0	3	4
111 Attending to examine books for the judges	0	3	4
112 Noting books for the judges, indexing and endorsing the grounds of objection or exception, including instructions and attendance on counsel for same, if necessary	0	13	4
113 Attending to inspect, under the Common Law Procedure Amendment Act, sec. 47	0	13	4
114 Never to exceed	2	0	0
115 Attendance before the master on special reference	0	6	8
N.B.—To be increased at the discretion of the officer according to the time occupied.			
Not to exceed on any one day	1	0	0
116 Attendance to enrol memorial of assignment of judgment	0	6	8
117 Attending to amend pleadings under order or by consent	0	6	8
118 For all the attendances in the offices of the Courts in cases where no term fee allowed	0	6	8

	£	s.	d.
119 Attending to draw money out of Court	0	13	4
120 Attending for jury panel	0	3	4
121 Attending to obtain names of viewers	0	3	4
122 Attendance to strike special jury	0	6	8
123 Attendance to reduce special jury	0	6	8
124 List of forty-eight names	0	2	0
125 List of twenty-four names	0	1	0
126 Attendance inquiring as to solvency of sureties proposed	0	6	8
127 Attendance, putting in or opposing special bail or sureties	0	6	8
128 Attendance at the Stamp Office	0	6	8
129 Attending to settle, and pay debt and costs	0	6	8

N.B.—If debt under £5, no instructions or attendance shall be allowed. But this shall not extend to actions brought for the purpose of trying a right to property more extensive than the sum sued for.

130 Attendance to enter suggestion on the roll	0	6	8
131 Attendance to pay money into Court	0	13	4
132 Attending on a view jury in Dublin	0	13	4
133 Ditto in the country, according to distance, not -exceeding, (exclusive of travelling expenses) per diem	2	2	0
134 Attendance on arbitrators, for each hour when business done	0	6	8
135 Not to exceed on any day	2	2	0
136 Attending the parties on execution of deeds, or to see assignments of judgments and memorials ex- ecuted	0	6	8
137 Also for each execution at a different time and place	0	6	8
138 Attending to examine witnesses, not to exceed in any case against the party	2	2	0
139 Attending to inspect or exhibit documents	0	6	8
140 Attending counsel with briefs, cases, pleadings, specification of demurrer, refreshers, retainers, to appoint consultations, and for certificates : this to include attendance on all the counsel, no matter how many	0	6	8
141 Attending consultation	0	13	4
142 Attending search for judgment when pleaded, and attending officer to sign certificate under 43rd rule	0	6	8
143 Attending on judge's summons or adjournment			

	£	s.	d.
thereof, or on any other matter where it is necessary to take directions or obtain his signature .	0	6	8
144 Attending judge for summons to settle exceptions, or to sign exceptions .	0	6	8
145 Attending to appoint guardian or prochein ami, and to sign consent to act .	0	6	8
146 Attending officer with statement of points relied on to support nul tiel record .	0	6	8
147 Attending on officer to produce record from another Court .	0	6	8
148 Attending Gazette and newspaper offices to insert notices to corporate and public bodies, for the attendance on each paper .	0	6	8
149 Each necessary attendance not herein otherwise provided for, for the first hour .	0	6	8
150 If on a public board, for the first hour .	0	13	4
151 For each further hour on same day .	0	6	8
152 Not to exceed on same day .	1	0	0
153 Each necessary attendance on the client, or on any other person by his directions, for the first hour .	0	6	8
154 For each succeeding hour employed .	0	6	8
155 Not to exceed on same day .	1	0	0
156 On appointment of new attorney, for his necessary instructions to enable him to obtain a knowledge of the cause, in ordinary cases .	0	6	8
157 To be increased when the officer is of opinion the labour deserves it, but not to exceed .	2	0	0

N.B.—This is not to be allowed against the party, except in cases where the change arises from absolute necessity, not from the voluntary act of the client.

Signing Fee.

158 Signing consents, admissions, certificates, summary memorandum of error, suggestion of error, pleadings, affidavits, reports, or other documents, to be filed pursuant to any statute or rule of Court, or any undertaking to appear and defend, or to go to trial.	0	2	6
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N.B.—The signing fee for writs and records is included in the allowances above made for those instruments.

Searches.

159	Search in the office for summons and plaint, or appearance and defence, or the like	0	3	4
	N.B.—These searches to be allowed when the time limited for performing the act has expired.			
160	Search for judgment, on reviving, satisfying, or assigning (to include instructions)	0	6	8
161	Docket and copy for requisition for search to be made by the registrar of deeds, six folios or under	0	5	0
162	For each succeeding folio	0	1	0
163	Attending registrar of deeds for office search, whether common or negative	0	13	4
164	Search on adversary's title in registry of deeds by attorney, previous to bringing ejectment, for each hour he is actually and necessarily employed in making the search	0	6	8

Briefs.

165	Draft brief for trial, comprising statement of the case, testimony of the witnesses, abstract of documents too long to brief, and necessary observations, for each brief sheet containing six folios	0	3	4
166	Copies of ditto; also copies of the necessary pleadings and documentary evidence, for each sheet containing six folios	0	2	0
167	Draft observations and copy for counsel on motion, law argument, or the like	0	5	4
168	Copies to accompany ditto, of affidavits, pleadings, and other necessary documents (when they exceed six folios) each sheet containing six folios	0	2	0
169	Docket of retainer, refresher, or the like, for the first counsel	0	3	4
170	For each of the other counsel	0	1	0
171	Copy statement of case for counsel to advise proofs, for each sheet of six folios	0	2	0

N.B.—The draft of such case allowed where brief for trial not afterwards made. Copies of pleadings and documents sent with case for proofs must be afterwards incorporated with briefs for trial.

£ s. d.

Taxation of Costs.

172 Draft costs between party and party, per page, to contain on the average twenty items	0	1	0
173 Copy	0	0	6

N.B.—In costs between attorney and client no draft allowed, nor copy, save that if the attorney had furnished his bill to his client for payment, and he is afterwards obliged to furnish his bill pursuant to the statute, or if he be obliged or requested to furnish extra copies to his client, or to third parties (as receivers in Chancery, &c.), or for taxation, then the extra copies are to be allowed for at the above rate.

174 Attendance to tax costs, not requiring summons	0	5	0
175 Ditto, on summons	0	6	8
176 For each successive hour	0	6	8
177 Examining a bill of costs by the attorney opposing it on taxation, for two hundred items or less	0	3	4

Enrolments.

178 On enrolling judgment, or other matter of record prepared by the officer, for the first roll	0	5	0	Enrol judgment.
179 For each succeeding roll	0	2	6	

SCHEDULE II.

FORMS OF EXECUTIONS, PURSUANT TO STATUTE 16 & 17 VIC.,
C. 113.

Victoria, &c., to the Sheriff of, &c. Whereas A. B., Elegit on a judgment in the Queen's Bench in assumpsit.
lately in our court before us at the Queen's Courts, Dublin, by the judgment of the same court, recovered against C. D. the sum of £ . . . , which in our said court before us were adjudged to the said A. B. for his damages which he had sustained, as well on occasion of the not performing of certain promises and undertakings then lately made by the said C. D. to the said A. B. as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record; and afterwards the said A. B. came into our said court before us, and, according to the form of the statutes in such case made and provided, chose to be delivered to him all

the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said C. D., or any person in trust for him was seized or possessed of, on the day of , in the year of our Lord , on which day the judgment aforesaid was entered up, or at any time afterwards, or over which the said C. D. on the said day of (*the day on which the judgment was entered up*), or at any time afterwards had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof to him and to his assigns, according to the form of the said statutes, until the damages aforesaid, together with interest upon the said sum of , at the rate of four pounds per centum per annum, from the day of in the year of our Lord , (*the day on which the judgment was entered up, or, in case the judgment was entered up prior to the 1st November, 1840, say "from the 1st day of November, 1840, in the year of our Lord, 1840,"*) shall have been levied. Therefore we command you, that without delay you cause to be delivered to the said A. B. at a reasonable price and extent, all the goods and chattels of the said C. D., in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said C. D. or any person in trust for him was seized or possessed of, on the said day of or at any time afterwards, or over which the said C. D. on the said day of , or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and his assigns, until the damages aforesaid, together with interest as aforesaid, shall have been levied; and in what manner you have executed this our writ, make appear to us at the Queen's Courts on next coming, under your seal and seals of those by whose oaths you shall make the said extent and appraisement, and have there then this writ.

Witness, Thomas Lefroy, Esq., the day of , in the
year of our reign.

Sum due to the Plaintiff, £

A. Bushe.

Attorney for the Plaintiff.

tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof to him and his assigns, until the debt and damages aforesaid shall be levied, and in what manner you shall have executed this writ, make appear to us at the Queen's Courts, on the day of next coming, under your seal and the seals of those by whose oaths you shall make such extent and appraisement, and have you then there the names of those persons by whose oaths you shall make such extent and appraisement, and this writ. Witness, Thomas Lefroy, Esq., at the Queen's Courts, the day of in the year of our reign.

Sum due to the Plaintiff, £

A. Bushe.

Attorney for the Plaintiff.

Fieri Facias
on a judgment in the
Queen's
Bench.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, and soforth, To the Sheriff of the County of greeting. We command you that off the goods and chattels of you cause to be levied in your bailiwick the sum of £ sterling, being the sum certified to be due on foot of the sum of £ lately adjudged to for debt and costs by the judgment of our Court, on the day of as it appears to us of Record; and have you that money, together with interest on said sum of £ , at the rate of four pounds per centum per annum, from the day of aforesaid, before us at the Queen's Courts on the day of next coming, to render to the said for the debt and costs and interest aforesaid; and that you do all such other acts as by an act passed in the sixteenth and seventeenth years of our reign you are in this behalf commanded, and have you then there this writ. Witness Thomas Lefroy, Esq., at the Queen's Courts, the day of in the year of our reign.

Sum due, £

A. Bushe.

Attorney for the Plaintiff.

Capias ad
satisfaciendum on a
judgment in
the Queen's
Bench.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, and soforth, To the Sheriff of the County of greeting: We command you that you take if to be found in your bailiwick, and safely keep, so that you have body before us at the Queen's Courts, on the day of next coming, to satisfy the sum of sterling, being the sum certified to be due on foot of the sum of lately adjudged to the said for debt and costs, by the judgment

of our Court, on the day of as it appears to us of
Record ; together with interest on the said sum of £ , at the
rate of four pounds per centum per annum, from the day of
one thousand eight hundred and aforesaid, and have
you then there this writ. Witness Thomas Lefroy, Esq., at the
Queen's Courts, the day of in the year of our
reign.

Sum due, £

A. Bushe.

Attorney for Plaintiff.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, and soforth, To the Sheriff of the County of greeting :
We command you that of the goods and chattels of being
in your bailiwick, you cause to be made the sum of sterling,
the amount of certain costs, which lately in our Court before us
at the Queen's Courts, Dublin, by a rule of our said Court, in-
tituled were by the said Court ordered to be paid by the
said to and further satisfy the said interest
upon the said sum of pounds, shillings, and
pence, sterling, at the rate of four pounds per centum per
annum, from the day of one thousand eight hundred and
being the date of said Rule, and when you so levy that
money, have the same before us at the Queen's Courts, Dublin,
on the day of next coming, then and there to be paid to
the said or attorney, and that you do all such other acts
as by an Act passed in the sixteenth and seventeenth years of
our reign, you are in this behalf commanded to do, and have you
then there this writ. Witness Thomas Lefroy, Esq., at the
Queen's Courts, day of in the year of our reign.

Sum due, £

A. Bushe.

Attorney.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, and soforth, To the Sheriff of the County of greeting :
We command you that you take if shall be
found in your bailiwick, and safely keep, so that you
have body before us at the Queen's Courts, Dublin, on the
day of next coming, to satisfy the sum
of £ sterling, which lately by a rule of our said Court, in-
tituled was by our said Court ordered to be paid by
the said to the said and further to satisfy the
said interest upon the said sum of £ at the rate of
four pounds per centum per annum, from the day of
one thousand eight hundred and forty being the date of said

*Fieri Facias
on a money
order in the
Queen's
Bench.*

*Capias ad
satisfaciendum
on a money order
in the
Queen's
Bench.*

rule, and then have you there this writ. Witness Thomas Le-
froy, Esq., at the Queen's Courts aforesaid, the day of
in the year of our reign.

Sum due, £

A. Bushe.

Attorney.

NOTE.—In the renewal of any of the foregoing writs, the proper
officer shall insert such return as the party seeking the same
may desire.

SCHEDULE III.

WRIT OF RECORDARI FACIAS LOQUELAM, FOR REMOVING REPLEVIN
FROM AN INFERIOR COURT.

Victoria, by the Grace of God, of the United Kingdom of
Great Britain and Ireland, Queen, Defender of the Faith, and
soforth, To (*Judge of Inferior Court*) greeting: We command
you that you cause to be recorded the plaint which is before you
in the Court of without our writ, between A. B. and
C. D. in the plea of taking and unjustly detaining goods and
chattels (*and cattle*), as it is said; and that you have the said
record before us in our Court of at Dublin, on the
day of under your seal, and that you give notice to the
parties, that they be then there, and that you have there this our
writ. Witness the seal of our Superior Courts of Common Law
hereunto set at Dublin, the day of in the year of our
Lord, 185

GENERAL ORDER.

1st February, 1854.

£ s. d.

SECTION 38.—Whereas in pursuance of the 31st Section
of the Common Law Procedure Amendment Act
(Ireland), 1853, the sum to be paid by the plaintiff
to the defendant as and for his costs occasioned by
his being served with a summons and plaint, has
been fixed by the Taxing Master at the sum (exclu-
sive of costs of execution) of

.	1	13	4
If execution be issued, at the further sum of	0	18	0

£2 11 4

SECTION 77.—And whereas, by the provisions of the 77th Section of the said Act, the sum to be allowed to the plaintiff, as costs of obtaining a peremptory order for the payment of his costs of suit when taxed, has been fixed by the said Taxing Master at . 1 0 0

SECTION 96.—And whereas, under the provisions of the 96th Section of the said Act, the sum for costs for which judgment may be marked, in addition to the principal sum in each case, where such principal sum shall amount to £20 or upwards, has been fixed by the said Taxing Master (exclusive of the costs of execution) at the sum of . 5 6 10
If execution be issued, at the further sum of . 0 18 1

£6 4 11

In each case where such principal sum shall exceed the sum of £5, and not amount to £20, the sum for costs has been, in like manner, fixed at the sum (exclusive of the costs of execution) of . 2 17 3
If execution issued, at the further sum of . 0 9 11

£3 7 2

And in each case where such principal sum shall not exceed the sum of £5, such sum for costs has been, in like manner, fixed (exclusive of the costs of execution) at the sum of . 1 12 6
And if execution do issue, at the further sum of . 0 6 0

£1 18 6

Now We, the Right Honourable Thomas Lefroy, Chief Justice; the Right Honourable James Henry Monahan, Chief Justice of the Court of Common Pleas; and the Right Honourable David Richard Pigott, Chief Baron of the Court of Exchequer, do approve of the said sums, so fixed by the Taxing Master.

1st February, 1854.

Signed,

THOMAS LEFROY.
JAMES HENRY MONAHAN.
D. R. PIGOTT.

GENERAL ORDER.

3rd February, 1854.

Whereas, under the provisions of the 96th Section of the "Common Law Procedure Amendment Act (Ireland), 1853," the Taxing Master has fixed the several sums for costs, to be allowed, and for which judgment may be marked, in addition to the "*principal*" sums in the several cases of judgment by default: And, whereas, such sums so fixed have been approved of by the Right Hon. the Chief Justice, the Chief Justice of the Court of Common Pleas, and the Right Hon. the Chief Baron of the Exchequer—now, in pursuance of the provisions of the said statute, and of all other statutes and powers—

IT IS ORDERED,

That if the plaintiff, in cases of judgment by default under the said section of the said act, shall claim as costs more than the respective sums so fixed and approved of, and shall require a taxation of his costs, the same shall be taxed according to the following scale, that is to say:—

In all cases where such principal sum, for which judgment has been marked, shall amount to or exceed the sum of £20, the plaintiff's attorney shall be allowed fees according to the scale and schedule of fees fixed and approved by the General Orders of the 11th January, 1854.

In cases where such principal sum shall exceed the sum of £5, and not amount to £20, the plaintiff's attorney shall be allowed no more than one-half of the ordinary costs.

In all cases where the principal sum shall not exceed the sum of £5, no instructions or attendances shall be allowed; and all other fees for any matter or work done, shall be reduced to one-fourth of the fees allowed by the schedule of fees fixed and approved of by the General Order of 11th January, 1854.

That in all cases of judgment by default, under the provisions of the said 96th section, no term-fee shall be allowed to the plaintiff.

That in case the plaintiff shall register such judgments by default, marked under said 96th section, the Master shall, in awarding the costs of such judgments respectively, on production of the certificate of such registration under 13th & 14th Vic., c. 74, add to the costs thereof the following sums and no more:—

£ s. d.

That is to say,—In all cases where the principal sum for which such judgment shall be marked shall amount to or exceed the sum of £20, the sum of . 1 0 0

	£	s.	d.
Where such principal sum shall exceed the sum of £5, and not amount to £20, the sum of	0	10	0
Where such principal sum shall not exceed the sum of £5, the sum of	0	6	0

3rd February, 1854.

Signed,

THOMAS LEFROY.
JAMES HENRY MONAHAN.
D. R. PIGOTT, C.B.
ROBERT TORRENS.
P. C. CRAMPTON.
RICHARD MOORE.
RICHARD W. GREENE.
N. BALL.

GENERAL ORDERS.

22nd January, 1856.

1. In every case in which the plaintiff's demand shall be for a debt or liquidated sum, whether with or without interest, founded upon a contract express or implied, the summons and plaint shall truly state in one sum in the prayer thereof the amount sought to be recovered ; and if the amount so sought to be recovered (exclusive of costs), shall be settled within six days from the service of the summons and plaint, the costs payable by the defendant shall be as follows, in the respective cases undermentioned :—

	£	s.	d.
If settled by a payment of £20, or upwards, ...	2	10	0
If settled by a payment under £20 and over £5, ...	1	5	0
If settled by a payment of £5, or less, ...	0	12	6

And the officer upon sealing any summons or plaint in the cases aforesaid, shall see that the form of notice at foot hereof, be endorsed thereon, or placed at foot thereon instead of the present form of endorsement ; and further, every copy of such summons and plaint shall be endorsed with, or have at foot thereof, a true copy of such endorsement.

" Notice pursuant to the Order of the 22nd day of January, 1856.

" If the amount sought to be recovered by the within summons and plaint, exclusive of costs, shall be settled with the plaintiff or his attorney, within six days from the service hereof, the costs payable by the defendant shall be as follows, in the respective cases undermentioned :—

	£	s.	d.
If settled by a payment of £20, or upwards	2	10	0
If settled by a payment of under £20, and above £5, ...	1	5	0
If settled by a payment of £5, or less, ...	0	12	6

See *ante*, pp. 5-9.

2. After defence or last subsequent pleading filed, and before notice of trial, or together with notice of trial, the plaintiff's attorney shall furnish to the defendant's attorney, a draft of the abstract of the pleadings and of the issues to be tried ; and in case the defendant shall not return the same approved of within four days from the delivery thereof, the plaintiff's attorney may take out a summons to settle the same before a judge, who shall proceed to settle the same in the manner and subject to the right of appeal prescribed by the 102nd section of the Common Law Procedure Act (Ireland), 1853. And this Order shall take effect from and after the 31st day of January instant.

See *ante*, p. 108.

3. The filing of the process in ejectment, or of a duplicate, or a copy thereof, for the purpose of enforcing an appearance and defence by any person who has been served, shall be deemed to be a sufficient filing for the like purpose, as against any person or persons subsequently served, so as to entitle the plaintiff to enforce an appearance and defence from each person so subsequently served : provided, however, that no person served shall be permitted to appear or defend after the time allowed to such person for that purpose under the Common Law Procedure Act (Ireland), 1853 ; and provided also that only one judgment shall be entered, which judgment shall not be entered until the time for taking defence allowed by the said Act to the person last served shall have expired.

See *ante*, p. 36.

4. The 187th of the Rules and Orders made on the 11th day of January, 1854, is hereby abrogated, and in lieu thereof it is ordered, that in every affidavit of service of the writ of summons and plaint in ejectment for non-payment of rent, it shall be stated, that the deponent knows not of and does not believe that there is any person other than those who have been served, who is tenant under the lease or instrument sought to be evicted, or is in possession or receipt of the rents and profits of the premises sought to be recovered, or of any part thereof, or who has any subsisting estate or interest in such premises, or in any part thereof, or is entitled to the interest granted to the original lessee or tenant by such lease or instrument, or to any part thereof, or who is a mortgagee thereof, whose mortgage has been registered within six calendar months from the perfection thereof, or who is assignee of any mortgage, and whose assignment has been in like manner registered ; and which statement shall be verified by the affidavit of the attorney for the plaintiff and by the person or one of the persons by whom he was employed to bring the ejectment.

GENERAL ORDERS.

15th day of November, 1859.

1. That in any action brought upon a negotiable instrument, when the plaintiff's attorney proceeds to mark a judgment by default, he shall sign and hand in to the officer a certificate stating whether or not more than one action has been brought on the same instrument, and such certificate shall be filed by the proper officer, together with the summary of the pleadings in such action.

2. That in any action where the plaintiff's attorney shall proceed to mark judgment under the 96th section of the Common Law Procedure Amendment Act (Ireland) 1853, when more than one action has been brought on the same negotiable instrument, the sum for costs which may be recovered under such judgment in such action shall, unless the Court or a Judge shall otherwise order, be one-half of the sums respectively fixed by the Taxing Master, and approved of by the General Order of 1st February, 1854, having regard to the sum for which such action has been brought, subject, however, to the right of taxation in said 96th section reserved.

Where two actions were brought upon the same bill of exchange, the first of which proved fruitless in consequence of the defendant dying in insolvent circumstances, and a judgment was marked against the defendant in the second action for the amount of the bill and full costs (the usual certificate prescribed by the first of the above general orders having been given), and a *ca sa* issued under which the defendant was arrested, it was held *per O'Brien J.* that the judgment so marked was a nullity, and notwithstanding delay on the part of the defendant, it was set aside (*Casey v. Parsons*, Ir. R. 2 C. L. 677).

Where no taxation of costs takes place, the plaintiff, if he seeks to be allowed full costs, must apply to the Court for that purpose, but, when a taxation takes place, it rests with the Taxing Master to allow or disallow them.—S.C.

3. That in every case where more than one action is brought upon the same negotiable instrument, the taxing officer shall, on the taxation of the costs of any such actions, whether the judgment thereon be obtained by default or otherwise, allow to the plaintiff only one-half of the ordinary costs of such action, having regard to the sum for which the action or actions have been brought, unless the plaintiff shall show to the satisfaction of the said taxing officer that there was a fair and reasonable ground for bringing more than one action in said case. The three preceding rules shall take effect from the last day of Michaelmas Term, 1859, and shall apply to all actions commenced after that day.

4. It is ordered that it shall be the duty of the commissioner or other officer before whom any affidavit to be filed in any Court is about to be sworn, to draw a line or lines through any blank that may occur in such affidavit, and to place his initials at the end of said line or lines. And the officer to whom any affidavit is tendered for filing, is hereby authorised and required to reject and refuse to receive any affidavit in which any blank shall occur that has not been filled up and initialled as aforesaid.

This rule shall take effect from the 1st day of Hilary Term, 1860.

GENERAL ORDER IN RELATION TO THE CONSOLIDATED *NISI PRIUS* COURT.

18th January, 1862.

That no certificate of counsel shall be requisite in order to enable plaintiffs to have cases coming within the terms of the 237th section

of the Common Law Procedure Act (1853), tried in the Consolidated *Nisi Prius* Court for the future, and that in addition to the cases specified in that section, all cases may be tried in that Court which shall be ordered to be tried therein by any of the three Superior Courts of Common Law, or by any Judge of any of such courts, provided, however, that nothing in this order contained shall be deemed to interfere with the discretion of the Judge sitting in that court to postpone the trial of any case to the after sittings, on his being satisfied that it cannot be conveniently tried in the Consolidated *Nisi Prius* Court.

THE LANDLORD AND TENANT LAW AMENDMENT
ACT (IRELAND), 1860.

(23 & 24 VICT., CH. 154, SECT. 75.)

GENERAL ORDERS.

29th May, 1863.

1. When the plaintiff in ejectment proceeds under the 75th section of the Act "To Consolidate and Amend the Law of Landlord and Tenant in Ireland," the notice of the plaintiff's application to the Court, that the defendant be required to enter into security by recognizance as therein provided, may be in the form at foot of these orders or to the like effect.

2. Such notice shall be given for a day certain in term, and shall be served six clear days at least before the day specified.

3. Copies of affidavits to sustain such application (save the affidavit of service of the summons and notices) shall be served with the summons and notice, but additional or answering affidavits may be used on the motion by leave of the Court or Judge.

4. The application for such security shall be moved on the day named in the notice of motion, and unless so moved or specially saved it shall stand discharged.

FORM OF NOTICE.

Take Notice that on the day of , an application on behalf of the plaintiff will be made to the Court of , at the Four Courts, Dublin, pursuant to the provisions of the 75th section of the Landlord and Tenant Law Amendment Act (Ireland), 1860, that the defendant shall, within

six days from the date of such application, enter into a recognizance by himself and two sufficient securities in a reasonable sum, conditioned to pay the costs, damages, and mesne profits, which shall be recovered by the plaintiff in the action, which motion will be grounded on the affidavits of copies of which are now delivered to you; and you are hereby informed that, in the event of such an order being made, if the defendant shall not comply therewith, by entering into security as required, the plaintiff will be at liberty to enter up judgment, notwithstanding any defence filed by the defendant for the recovery of the possession of the premises and his costs of this suit.

Dated this day of 18 .

RULES AND ORDERS IN RELATION TO THE APPOINTMENT OF COMMISSIONERS FOR TAKING AFFIDAVITS OR SPECIAL BAIL.

COURT OF QUEEN'S BENCH,
13th June, 1864.

1. From and after this date, every application for the appointment of any person to act as a commissioner for taking affidavits or special bail (for the Superior Courts of Common Law in Ireland, within any county in Ireland, or as a commissioner for taking affidavits within any district in Great Britain), pursuant to the 13th Vict., ch. 18, sect. 47, shall be by motion to this Court, grounded upon affidavits and certificates, as hereinafter mentioned.

2. An affidavit shall be made by the applicants, setting forth the county or district, in and for which he seeks to be appointed such commissioner, as also his place of residence and usual occupation or business, and that he has such residence or place of business in or near to a city or town in the county or district, so that access to him may be readily had. It shall also state the number of commissioners already in such city or town, or within ten miles thereof, and in case of an application from Great Britain, it shall state how many commissioners there are within the entire district for which an appointment is sought, and where they are respectively resident; and in every case the affidavit shall set forth whether a vacancy has been recently occasioned, and if so, whether by death, resignation, or otherwise, and that to the best of deponent's belief, the certificate relied on, and the signatures thereto, are true and genuine.

3. The certificate or certificates on which every application for a commissionership in Ireland shall be grounded, shall be in the form hereto annexed, or to the like effect, and shall be signed by not less than six barristers of the circuit to which the county belongs, of whom not less than two shall be Queen's counsel, by not less than six attorneys actually practising, and by such magistrates and other persons resident in the county as he may be able to procure, who will testify that a commissioner is wanted, and that the applicant is a fit and proper person to be appointed.

Form of General Certificate.

We, the undersigned, whose names, descriptions, and residence are attached hereto, do certify to Her Majesty's Court of Queen's Bench, that a commissioner for taking affidavits [and special bail *if required*] for the superior Courts of Common Law in Ireland, is much wanted at the town of _____, in and for the county [or district] of _____; and we further certify that Mr. _____ of that town [specifying his calling, trade, or occupation] is a person well qualified by his skill and trustworthiness to fill the office above-mentioned.

Form of Barrister's Certificate.

We, the undersigned, Barristers-at-Law and going the circuit, do hereby certify to Her Majesty's Court of Queen's Bench that we verily believe Mr. _____ of _____, in the county of _____, is a person qualified and competent to discharge the duties of a commissioner for taking affidavits [and special bail *if required*] at _____, aforesaid, in and for the said county, and is a fit and proper person to be appointed thereto.

4. The certificate grounding an application from Great Britain shall be in the form of the general certificate above set forth, or to the like effect; but every barrister, attorney, magistrate, merchant, or other person signing the same, shall affix to his signature his degree, profession, or avocation, and the place of his residence.

5. No affidavit or certificate shall be moved on, until the same shall be duly filed in the office of the Clerk of the Rules of this Court, and certified copies thereof produced to and left with him; and that attested copies of every document so filed may be had on application at the office of the Clerk of the Rules.

6. If the application for a commissionership in Ireland shall be entertained, the primary order made on the motion shall be, that the same do stand over for a day certain named therein, being not less than one week in full term; and a copy of the said order, setting forth the nature of the application, with a

reference to the documents on which it has been grounded, shall within three days be delivered to, or left at, or transmitted by registered letter to the residence or place of business of every commissioner within the same town or place, or within ten miles thereof ; and in case of an application from Great Britain, such special directions shall be given with respect to the notification of such intended appointment as the Court shall under the circumstances think proper, and shall insert in its order.

7. If after the making of such primary order as aforesaid, any other application shall be made with respect to the same city or town in Ireland, or to a place within ten miles thereof, or with respect to the same district in Great Britain, it shall be subject to such special orders and directions as the Court shall think fit to make in respect thereof.

8. The attorney of the applicant shall attend the court in his proper person, as well on the application for the primary order as upon every subsequent application, in order to give his personal voucher for the respectability and fitness of the applicant, and answer such questions as may be put to him by the Court.

9. After the primary order has been made, notice thereof, and of the day on which the final order is to be moved for, shall be notified by the clerk of the rules in the *Legal Diary* on each day in full term until the matter shall be disposed of.

10. Before the final order shall be moved for, an affidavit of the due service of the primary order shall be made and lodged, with the Clerk of the Rules.

11. The Clerk of the Rules shall keep in his office a book, in which shall be entered the name of every person holding a commission from the Court, or otherwise authorised to take affidavits, or special bail in the country, or to take affidavits in Great Britain for the superior courts of common law in Ireland ; also the town and county, or other district specified in his commission, with the date and the extent thereof ; and in the said book shall also be noted whether such commission has for any and what cause been suspended, withdrawn, or annulled.

12. The Clerk of the Rules shall furnish to every person, on his being appointed such commissioner as aforesaid, together with his commission, and for his better guidance and instruction as to his duties, a printed copy of the General Orders of the Courts of Queen's Bench, Common Pleas, and Exchequer, bearing date the 11th day of January, 1854, and numbered from 140 to 145 both inclusive, or any other general rules and orders for the time being in force, for the regulation of the duties of the said office.

RULES AND REGULATIONS BY THE JUDGES OF THE
COURT OF QUEEN'S BENCH IN IRELAND,

(Pursuant to the 38th section of the 27th and 28th Vic. cap. 99, intituled "*An Act to amend the Procedure of Civil Bill Courts in Ireland, 1864.*")

22nd February, 1866.

1st. That when a Judge of assize upon the trial of any appeal from a Civil Bill Court shall direct a special case to be stated for the opinion of a superior court of common law, and shall sign same, the appellant shall within seven days after the signing thereof lodge same with the Clerk of the Rules of such court, and the Clerk of the Rules of the Court of Queen's Bench shall direct, according to the following rule :—

2nd. That such special cases shall be heard and determined in rotation by the several superior courts of common law—that is to say, the first case by the Court of Queen's Bench, the second by the Court of Common Pleas, and the third by the Court of Exchequer, and so in continuous rotation, so as to have an equal distribution thereof; and the Clerk of the Rules of the Court of Queen's Bench shall accordingly, upon the production to him of each such case, direct same to be lodged in such court, as according to such rotation as aforesaid would be the proper court to hear and determine same, and shall endorse such direction on each such case, and sign and date same.

3rd. That in order to carry out such distribution in rotation, the Clerk of the Rules of the Court of Queen's Bench shall keep a book or record of all cases so directed by the Judge of assize, and shall in said book, upon the production of each such case, forthwith make the necessary entry therein, stating the county or other locality, and the Judge from whom same was received, and the Court by which same is to be heard and determined, according to such direction as in foregoing second rule is mentioned.

4th. That the appellant upon lodging such case in the proper court shall pursue the same course of practice as to setting down for hearing, etc., as in cases at present set down under the Act 20th and 21st Vic. ch. 43, and which practice is governed by the 50th and 51st General Orders of the three Superior Courts of Law, dated 11th January, 1854.

5th. That the parties, appellant and respondent, shall respectively as between each other, be entitled to the like costs as are now allowed to appellant and respondent, under the said Act of 20th and 21st Vic. ch. 43.

APPENDIX.

PART II.

CONSISTING OF STATUTES RELATING TO THE LAW OF EVIDENCE.

2 & 3 WILLIAM IV. CHAP. LXXXVII

An Act to regulate the office for Registering Deeds, Conveyances, and Wills in Ireland.

Office copies
of memorials
to be received
in evidence.

XXXII. "And whereas it is convenient that office copies of the memorial registered in the said register office should, under certain limitations, be received in evidence;" Be it therefore enacted that in all proceedings before any court of justice for all purposes whatsoever, an office copy of any memorial registered in the said office shall, upon such office copy being proved in like manner as the office copy of any other record, be received and taken as evidence of the contents of the memorial of which it purports to be an office copy without the production of the original memorial: Provided always that the party producing such office copy shall, if out of Dublin ten days, and if in Dublin eight days before producing the same, give notice in writing to the adverse party thereof; and provided also, that such adverse party shall not within four days after receiving such notice, demand by a counter-notice that the original memorial shall be produced; and in every case in which such counter-notice shall be given, the costs of producing the original memorial shall be paid by either party, as the court in which the proceeding shall take place, or the Taxing Officer of such court may determine.

The provisions of the above section do not apply to the registered office copy of the affidavit of ownership in the case of a judgment mortgage (*Reidy v. Pierce*, 11 Ir. C. L. R. 361). In order to prove a judgment mortgage three things must be proved,—first, that a judgment has been duly entered up; secondly, that a proper affidavit has been filed in the court in which the judgment is entered; thirdly, that such affidavit was duly registered in the office for registering deeds and wills, by depositing in that office an office copy of the affidavit (*Duncan v. Brady* 12 Ir. C. L. R. 171, *per O'Brien, J.*). As to the nature of the proofs necessary for proving the three matters mentioned, see the two cases referred to above.

6 & 7 VIC. CHAP. LXXXV.

An Act for improving the Law of Evidence.

[22nd August, 1843.]

Whereas the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced and on the truth of their testimony : Now therefore be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, that no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question or on any inquiry arising in any suit, action or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having, by law or by consent of parties, authority to hear, receive, and examine evidence : but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or injury, or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence : Provided that this Act shall not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively ; provided also, that this Act shall not repeal any provision in a certain Act passed in the session of Parliament holden in the seventh year of the reign of his late Majesty and in the first year of the reign of her present Majesty, intituled *An Act for the Amendment of the Laws with respect to Wills* : Provided that in Courts of Equity any defendant to any cause pending in any such court may be examined as a witness on the behalf of the plaintiff or of any co-defendant in any such cause, saving just exceptions ; and that any interest which such defendant so to be examined

Witnesses not to be excluded from giving evidence by incapacity from crime or interest.

Proviso.

Not to repeal any provision in 7 W. IV., & 1 Vict. c. 26.

In Courts of Equity defendant may be examined on behalf of the plaintiff or any co-defendant, &c.

may have in the matters or any of the matters in question in the cause shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting or tending to affect the credit of such defendant as a witness.

In legal proceedings, not necessary to state that jurors had made affirmation.

II. And be it enacted, that wherever in any legal proceedings, whatever legal proceedings may be set out, it shall not be necessary to specify that any particular persons who acted as jurors had made affirmation instead of oath, but it may be stated that they served as jurymen, in the same manner as if no Act had passed for enabling persons to serve as jurymen without oath.

As to suits commenced before passing this Act.

III. And be it enacted, that nothing in this Act shall apply to or affect any suit, action, or proceeding brought or commenced before the passing of this Act.

Not to extend to Scotland.

IV. And be it enacted, that nothing in this Act shall extend to *Scotland*.

8 & 9 VICT. CHAP. CXIII.

An Act to facilitate the admission in evidence of certain official documents.

[8th August, 1845.]

Whereas it is provided by many statutes that various certificates, official and public documents, documents and proceedings of corporations and of joint stock and other companies, and certified copies of documents, bye-laws, entries in registers and other books, shall be receivable in evidence of certain particulars in Courts of Justice, provided they be respectively authenticated in the manner prescribed by such statutes : and whereas the beneficial effect of these provisions has been found by experience to be greatly diminished by the difficulty of proving that the said documents are genuine ; and it is expedient to facilitate the admission in evidence of such and the like documents : be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that whenever by any act now in force or hereafter to be in force any certificate, official or public document, or document or proceeding of any corporation or joint stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any Court of Justice, or before any legal tribunal, or either House of Parliament, or any committee of either House, or in any judicial pro-

Certain documents to be received in evidence without proof of seal or signature, &c., of person signing the same.

ceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original record could have been received in evidence.

II. And be it enacted, that all Courts, Judges, Justices, Masters in Chancery, Masters of Courts, Commissioners judicially acting, and other judicial Officers, shall henceforth take judicial notice of the signature of any of the Equity or Common Law Judges of the Superior Courts at *Westminster*, provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document.

Courts, &c., to take judicial notice of signature of Equity or Common Law Judges, &c.

III. And be it enacted, that all copies of private and local and personal Acts of Parliament not public Acts, if purporting to be printed by the Queen's printers, and all copies of the journals of either House of Parliament, and of royal proclamations, purporting to be printed by the printers to the Crown or by the printers to either House of Parliament, or by any or either of them, shall be admitted as evidence thereof by all Courts, Judges, Justices, and others, without any proof being given that such copies were so printed.

Copies of Private Acts printed by Queen's printer, journals of Parliament, and proclamations, admissible as evidence.

IV. Provided always, and be it enacted, that if any person shall forge the seal, stamp, or signature of any such certificate, official or public document, or document or proceeding of any corporation or joint stock or other company, or of any certified copy of any document, bye-law, entry in any register or other book, or other proceeding as aforesaid, or shall tender in evidence any such certificate, official or public document, or document or proceeding of any corporation or joint stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, whether such seal, stamp, or signature be those of or relating to any corporation or company already established, or to any corporation or company to be hereafter established, or if any person shall forge the signature of any such judge as aforesaid to any order, decree, certificate, or other judicial or official document, or shall tender in evidence any order, decree, certificate, or other judicial or official document with a false or counterfeit signature of any such judge as aforesaid thereto, knowing the same to be false or counterfeit, or if any person shall print any copy of any private act or of the journals of either House of Parliament, which copy shall falsely purport

Persons forging seal, stamp, or signature of certain documents, or print any private act with false purport, guilty of felony.

to have been printed by the printers to the Crown, or by the printers to either House of Parliament, or by any or either of them, or if any person shall tender in evidence any such copy, knowing that the same was not printed by the person or persons by whom it so purports to have been printed, every such person shall be guilty of felony, and shall upon conviction be liable to transportation for seven years, or to imprisonment for any term not more than three nor less than one year, with hard labour: provided also, that whenever any such document as before-mentioned shall have been received in evidence by virtue of this Act, the court, judge, commissioner, or other person officiating judicially who shall have admitted the same shall, on the request of any party against whom the same is so received, be authorized, at its or at his own discretion, to direct that the same shall be impounded, and be kept in the custody of some officer of the Court, or other proper person, until further order touching the same shall be given either by such Court, or the Court to which such master or other officer belonged, or by the persons or person who constituted such Court, or by some one of the Equity or Common Law Judges of the Superior Courts at *Westminster* on application being made for that purpose.

Not to extend to Scotland.

V. And be it enacted that this Act shall not extend to *Scotland*.

Alteration of Act.

VI. And be it enacted, that this Act may be repealed, altered, or amended during this present Session of Parliament.

Commencement of Act.

VII. And be it enacted, that this Act shall take effect from the First day of *November* next after the passing thereof.

14 & 15 VICT., CHAP. XCIX.

An Act to Amend the Law of Evidence.

[7th August, 1851.]

Whereas it is expedient to amend the Law of evidence in divers particulars: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:—

Recited proviso in s. 1 of 6 & 7 Vict. c. 85, repealed.

I. So much of section 1 of the act of the 6th and 7th years of Her present Majesty, chapter 85, as provides that the said act shall "not render competent any party to any suit, action, or proceeding individually named in the record, or

any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part," is hereby repealed.

II. On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any Court of Justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action or other proceeding.

Parties to be admissible witnesses.

III. But nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband.

Nothing herein to compel person charged with criminal offence to give evidence tending to criminate himself, &c.

IV. Nothing herein contained shall apply to any action, suit, proceeding, or bill, in any Court of Common Law, or in any Ecclesiastical Court, or in either House of Parliament, instituted in consequence of adultery, or to any action for breach of promise of marriage.

Not to apply to proceedings in consequence of adultery, &c.

V. Nothing herein contained shall repeal any provision contained in chapter twenty-six of the statute passed in the session of Parliament holden in the seventh year of the reign of King William the Fourth, and the first year of the reign of her present Majesty.

Nothing to repeal any provisions of 7 W. 4 & 1. Vict., c. 26.

VI. Whenever any action or other legal proceeding shall henceforth be pending in any of the Superior Courts of Common Law at *Westminster* or *Dublin*, or the Court of Common Pleas for the county palatine of *Lancaster*, or the Court of Pleas for the county of *Durham*, such court and each of the Judges thereof may respectively, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary to take examined copies of the same, or to procure the same to be duly stamped, in all cases in which previous to the passing of this act

Common Law Courts authorized to compel inspection of documents whenever equity would grant discovery.

discovery might have been obtained by filing a bill, or by any other proceeding in a court of equity at the instance of the party so making application as aforesaid to the said Court or Judge.

Foreign and Colonial Acts of State, judgments, &c. provable by certified copies, without proof of seal, or signature, or judicial character of person signing the same.

VII. All proclamations, treaties, and other acts of state of any foreign state, or of any *British* colony, and all judgments, decrees, orders, and other judicial proceedings of any Court of Justice in any foreign state or in any *British* colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any Court of Justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or *British* colony which to the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or, in the event of such court having no seal, to be signed by the Judge, or, if there be more than one Judge, by any one of the Judges of the said court, and such Judge shall attach to his signature a statement in writing on the said copy that the court whereof he is Judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.

Apothecaries' certificates admissible without proof of seal.

VIII. Every certificate of the qualification of an apothecary which shall purport to be under the common seal of the Society of the art and mystery of Apothecaries of the city of *London* shall be received in evidence in any Court of Justice, and before any person having by law or by consent of parties authority to hear, receive, and examine evidence, without any proof of the said seal or of the authenticity of the said certificate, and shall be deemed sufficient proof that the person named therein has been from the date of the said certificate duly qualified to practise as an apothecary in any part of *England* or *Wales*.

IX. Every document which by any law now in force, or hereafter to be in force, is or shall be admissible in evidence of any particular in any Court of Justice in *England or Wales*, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any Court of Justice in *Ireland*, or before any person having in *Ireland* by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

Documents admissible without proof of seal, &c., in *England or Wales* equally admissible in *Ireland*.

X. Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any Court of Justice in *Ireland* without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any Court of Justice in *England or Wales*, or before any person having in *England or Wales* by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

Documents admissible without proof of seal, &c., in *Ireland* equally admissible in *England and Wales*.

XI. Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any Court of Justice in *England or Wales or Ireland*, without proof of the seal or stamp or signature authenticating the same, or of the official or judicial character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any Court of Justice of any of the *British Colonies*, or before any person having in any of such colonies by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

Documents admissible without proof of seal, &c., in *England, Wales, or Ireland*, equally admissible in the *Colonies*.

XII. Every register of a vessel kept under any of the acts relating to the registry of British vessels may be proved in any Court of Justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by the production of the original or by an examined copy thereof, or by a copy thereof purporting to be certified under the hand of the person having the charge of the original, and which person is hereby required to furnish such certified copy to any person applying at a reasonable time for the same, upon payment of the sum of one shilling: and every such register or such copy of a register, and also every certificate of registry, granted

Registers of British vessels and certificates of Registry admissible *prima facie* evidence of their contents, without proof of signature, &c.

under any of the acts relating to the registry of *British* vessels, and purporting to be signed as required by law, shall be received in evidence in any Court of Justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, as *prima facie* proof of all the matters contained or recited in such register when the register or such copy thereof as aforesaid is produced, and of all the matters contained or recited in, or endorsed on such certificate of registry when the said certificate is produced.

Where necessary to prove conviction or acquittal of person charged, not necessary to produce record, but may be certified under hand of Clerk of Court.

XIII. And whereas it is expedient, as far as possible, to reduce the expense attendant upon the proof of criminal proceedings: be it enacted, that whenever in any proceeding whatever it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person or a copy thereof, but it shall be sufficient that it be certified or purport to be certified under the hand of the Clerk of the Court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof.

Examined or certified copies of documents admissible in evidence.

XIV. Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any Court of Justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words.

Certifying a false document a misdemeanour.

XV. If any officer authorized or required by this act to furnish any certified copies or extracts shall wilfully certify any document as being a true copy or extract, knowing that the same is not a true copy or extract, as the case may be, he shall be guilty of a misdemeanour, and be liable, upon conviction, to imprisonment for any term not exceeding eighteen months.

Court, &c., may administer oaths.

XVI. Every court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively.

XVII. If any person shall forge the seal, stamp, or signature of any document in this act mentioned or referred to, or shall tender in evidence any such document with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, he shall be guilty of felony, and shall upon conviction be liable to transportation for seven years, or to imprisonment for any term not exceeding three years nor less than one year, with hard labour; and whenever any such document shall have been admitted in evidence by virtue of this act, the court or the person who shall have admitted the same may, at the request of any party against whom the same is so admitted in evidence, direct that the same shall be impounded and be kept in the custody of some officer of the court or other proper person for such period and subject to such conditions as to the said court or person shall seem meet; and every person who shall be charged with committing any felony under this act, or under the act of the eighth and ninth years of Her present Majesty, chapter one hundred and thirteen, may be dealt with, indicted, tried, and if convicted, sentenced, and his offence may be laid and charged to have been committed in the county, district, or place in which he shall be apprehended or be in custody; and every accessory before or after the fact to any such offence may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence laid and charged to have been committed in any county, district, or place in which the principal offender may be tried.

Persons forging seal, stamp, or signature of certain documents, or wilfully uttering same, guilty of felony.

XVIII. This act shall not extend to *Scotland*.

Act not to extend to Scotland.

XIX. The words "*British Colony*" as used in this act shall apply to all the *British* territories under the Government of the *East India Company*, and the islands of *Guernsey*, *Jersey*, *Alderney*, *Sark* and *Man*, and to all other possessions of the *British Crown*, wheresoever and whatsoever.

Interpretation of "*British Colony*."

XX. This act shall come into operation on the first day of *November* in the present year.

Commencement of act.

16 & 17 VICT. CHAP. LXXXIII.

An Act to amend an Act of the Fourteenth and Fifteenth Victoria, Chapter Ninety-nine.

[20th August, 1853.]

Whereas the law touching evidence requires further amendment: be it therefore declared and enacted by the Queen's most

excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Husbands and wives of parties to be admissible witnesses ;

I. On the trial of any issue joined, or any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any Court of Justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit, action, or other proceeding may be brought or instituted, or opposed or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either by *viva voce* or by deposition according to the practice of the Court, on behalf of either or any of the parties to the said suit, action, or other proceeding.

except in criminal cases and in cases of adultery.

II. Nothing herein shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any criminal proceeding, or in any proceeding instituted in consequence of adultery.

Husbands and wives not compelled to disclose communications.

III. No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage.

So much of section 1 of 6 & 7 Vict. c. 85, as relates to husbands and wives, repealed.

IV. So much of section one of the Act passed in the session of Parliament holden in the sixth and seventh years of her present Majesty, chapter eighty-five, as provides that the said Act shall not render competent the husband or wife of any party to any suit, action, or proceeding individually named in the record, or of any lessor of the plaintiff or of the tenant of premises sought to be recovered in ejectment, or of the landlord or other person in whose right any defendant in replevin may make cognizance, or of any lessor in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, is hereby repealed.

Short title.

V. In citing this Act in other Acts of Parliament, or in any instrument, document, or proceeding, it shall be sufficient to use the expression, "The Evidence Amendment Act, 1853."

Commencement of Act.

VI. This Act shall commence on the Eleventh day of July One thousand eight hundred and fifty-three.

17 & 18 VICT. CHAP. XXXIV.

An Act to enable the Courts of Law in England, Ireland, and Scotland, to issue Process to compel the Attendance of Witnesses out of their Jurisdiction, and to give Effect to the Service of such Process in any Part of the United Kingdom.

[10th July, 1854.]

Whereas great inconvenience arises in the administration of justice from the want of a power in the Superior Courts of Law to compel the attendance of witnesses resident in one part of the United Kingdom at a trial in another part, and the examination of such witnesses by commission is not in all cases a sufficient remedy for such inconvenience: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. If, in any action or suit now or at any time hereafter depending in any of her Majesty's Superior Courts of Common Law at *Westminster* or *Dublin*, or the Court of Session or Exchequer in *Scotland*, it shall appear to the Court in which such action is pending, or, if such Court is not sitting, to any Judge of any of the said Courts respectively, that it is proper to compel the personal attendance at any trial of any witness who may not be within the jurisdiction of the Court in which such action is pending, it shall be lawful for such court or Judge, if in his or their discretion it shall so seem fit, to order that a writ called a writ of *Subpœna ad testificandum* or of *Subpœna duces tecum* or warrant of citation shall issue in special form, commanding such witness to attend such trial wherever he shall be within the United Kingdom, and the service of any such writ or process in any part of the United Kingdom shall be as valid and effectual to all intents and purposes as if same had been served within the jurisdiction of the Court from which it issues.

Courts of Law in England, Ireland, and Scotland, may issue process to compel the attendance of witnesses although not within their jurisdiction.

An application to the Court for leave to issue a *subpœna ad testificandum* under this section is made *ex-parte*. It must be supported by affidavit, and special grounds must be shown in support of the application (*Richardson v. Gregory*, 4 Ir. C. L. R. 248). The affidavit should state that the evidence of the person proposed to be subpoenaed is material and cannot be proved *aliunde* (*Wade v. Fox*, 7 Ir. Jur. O. S. 48; *Lawder v. Lawder*, ib. 28); and so much of the facts should be disclosed as to indicate the necessity for the attendance of the witness (*Newich v. Gregory*, 7 Ir. Jur. O. S. 144; *Davis v. Reeves*, ib. 291); it should also be shown that the evidence could not be satisfactorily taken under a commission (*Dunne v. Lewis*, 8 Ir. C. L. R. Ap. 54).

Statement to be made at foot of Writ that it is issued by special order.

Witnesses making default to be punished by the Courts of the country in which the process was served.

Persons not to be punished if it shall appear that sufficient money has not been tendered to pay expenses.

Act not to prevent the issuing of a commission to examine witnesses.

Not to affect the admissibility of evidence where now receivable.

II. Every such writ shall have at foot thereof a statement or notice that the same is issued by the special order of the Court or Judge, as the case may be ; and no such writ shall issue without such special order.

III. In case any person so served shall not appear according to the exigency of such writ or process, it shall be lawful for the Court out of which the same issued, upon proof made of the service thereof, and of such default, to the satisfaction of the said Court, to transmit a certificate of such default under the seal of the same Court, or under the hand of one of the Judges or Justices of the same, to any of her Majesty's Superior Courts of Common Law at Westminster, in case such service was had in England, or in case such service was had in Scotland to the Court of Session or Exchequer at Edinburgh, or in case such service was had in Ireland to any of her Majesty's Superior Courts of Common Law at Dublin ; and the Court to which such certificate is so sent shall and may thereupon proceed against and punish the person so having made default in like manner as they might have done if such person had neglected or refused to appear in obedience to a writ of subpoena or other process issued out of such last-mentioned Court.

IV. None of the said Courts shall in any case proceed against or punish any person for having made default by not appearing to give evidence in obedience to any writ of subpoena or other process issued under the powers of this Act, unless it shall be made to appear to such Court that a reasonable and sufficient sum of money to defray the expenses of coming and attending to give evidence, and of returning from giving such evidence, had been tendered to such person at the time when such writ of subpoena or process was served upon such person.

V. Nothing herein contained shall alter or affect the power of any of such Courts to issue a commission for the examination of witnesses out of their jurisdiction, in any case in which, notwithstanding this Act, they shall think fit to issue such commission.

VI. Nothing herein contained shall alter or affect the admissibility of any evidence at any trial where such evidence is now by law receivable, on the ground of any witness being beyond the jurisdiction of the Court, but the admissibility of all such evidence shall be determined as if this Act had not passed.

18 & 19 VICT., CHAP. XLII.

An Act to enable British Diplomatic and Consular Agents abroad to administer Oaths and do notarial Acts.

[2nd July, 1855.]

Whereas by an act of the sixth year of King *George the Fourth*, 6 G. 4, c. 87. chapter eighty-seven, powers are given to *British Consuls General* and *Consuls* to administer oaths and do notarial acts in the foreign places to which they are appointed; and it is expedient that the like powers should be given to ambassadors and other diplomatic agents and to *Vice-Consuls* and *Consular agents* abroad; Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:—

I. From and after the passing of this act, it shall and may be lawful for every *British Ambassador*, *Envoy*, *Minister*, *Charge d'Affaires*, or *Secretary of Embassy* or of *Legation* exercising his functions in any foreign country, and for every *British Vice-Consul*, *Acting Consul*, *Pro-Consul*, or *Consular agent* (as well as every *Consul General* or *Consul*) exercising his functions in any foreign place, whenever he shall be thereto required, and whenever he shall see necessary, to administer in such foreign country or place any oath or to take any affidavit or affirmation from any person whomsoever, and also to do and perform in such foreign country and place, all and every notarial acts or act which any notary public could or might be required and is by law empowered to do within the United Kingdom of *Great Britain* and *Ireland*; and every such oath, affidavit, or affirmation, and every such notarial act, administered, sworn, affirmed, had, or done by or before such *Ambassador*, *Envoy*, *Minister*, *Charge d'Affaires*, *Secretary of Embassy* or of *Legation*, *Vice-Consul*, *Acting Consul*, *Pro-Consul*, or *Consular agent*, shall be as good, valid, and effectual, and shall be of like force and effect, to all intents and purposes, as if such oath, affidavit, affirmation, or notarial act, respectively, had been administered, sworn, affirmed, had, or done before any Justice of the Peace or notary public in any part of the United Kingdom of *Great Britain* or *Ireland*, or before any other legal or competent authority of the like nature.

Oaths may be administered by Ambassadors and other British Ministers abroad.

II. Affidavits and affirmations so taken as aforesaid under the said act of King *George the Fourth* or this act, shall and may be received, read, and made use of in and before any Court of Law or Equity or other Judicature whatever in any part of the

Affidavits taken before Ambassadors, &c., abroad may

be used
in courts
in the
United
Kingdom.

United Kingdom, and the judges and officers thereof, in or in relation to any action, suit, cause, matter, or proceeding in or before any such Court or Judicature, in like manner, and shall be of the same force and effect as affidavits and affirmations taken in or before such Court or Judicature, or by any person duly commissioned or authorized by such Court or Judicature to take such affidavits or affirmations, and shall be filed and dealt with accordingly.

Documents
to be
admitted in
evidence
without
proof of the
seal or
signature of
the Ambassa-
dor or other
official per-
son.

III. Any document purporting to have affixed, impressed, or inscribed thereon or thereto the seal and signature of any *British* Ambassador, Envoy, Minister, Charge d'Affaires, Secretary of Embassy or of Legation, Consul General, Consul, Vice-Consul, Acting Consul, Pro-Consul, or Consular agent, in testimony of any such oath, affidavit, affirmation, or act having been administered, sworn, affirmed, had, or done by or before him, shall be admitted in evidence without proof of any such seal and signature being the seal and signature of the person whose seal and signature the same purport to be, or of the official character of such person.

Persons
swearing or
affirming
falsely guilty
of perjury.

IV. Any person knowingly and wilfully making any false oath, affidavit, or affirmation before any person having authority to administer such oath or take such affidavit or affirmation under the said act of King *George* the Fourth or this act, shall be deemed guilty of perjury, and such offender may be charged, proceeded against, tried and dealt with in any county or place in the United Kingdom in the same manner in all respects as if the offence had been committed in such county or place.

Persons
forging seal
or signature
guilty of
felony.

V. If any person shall forge any such seal or signature as aforesaid, or shall tender in evidence any such document as aforesaid with a false or counterfeit seal or signature thereto, knowing the same to be false or counterfeit, he shall be guilty of felony, and shall upon conviction be liable to penal servitude for the term of four years, or to be imprisoned, with or without hard labour, for any term not exceeding three years nor less than one year; and whenever any such document has been admitted in evidence by virtue of this act, the court or the person who has admitted the same may, at the request of any party against whom the same is so admitted in evidence, direct that the same shall be impounded and be kept in the custody of some officer of the court or other proper person for such period, and subject to such conditions as to the said court or person shall seem meet; and every person charged with committing any felony under this act may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence may be laid and charged to have been committed in the county, district, or place in which he may be apprehended or be in custody; and every accessory before or after the fact to any such offence may be dealt with, indicted, tried, and,

if convicted, sentenced, and his offence laid and charged to have been committed in any county, district, or place, in which the principal offender may be tried.

22 VICT., CHAP. XX.

An Act to provide for taking Evidence in Suits and Proceedings, pending before Tribunals in Her Majesty's Dominions in places out of the Jurisdiction of such Tribunals.

[19th April, 1859.]

Whereas it is expedient that facilities be afforded for taking evidence in or in relation to actions, suits, and proceedings pending before tribunals in Her Majesty's dominions in places in such dominions out of the jurisdiction of such tribunals: Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and, by the authority of the same, as follows:—

I. Where upon an application for this purpose it is made to appear to any court or Judge having authority under this act, that any court or tribunal of competent jurisdiction in Her Majesty's dominions has duly authorized by commission, order, or other process, the obtaining the testimony in or in relation to any action, suit, or proceeding pending in or before such court or tribunal of any witness or witnesses out of the jurisdiction of such court or tribunal, and within the jurisdiction of such first-mentioned court, or of the court to which such Judge belongs, or of such Judge, it shall be lawful for such court or Judge to order the examination before the person or persons appointed, and in manner and form directed by such commission, order, or other process as aforesaid, of such witness or witnesses accordingly; and it shall be lawful for the said court or Judge by the same order, or for such court or Judge, or any other Judge having authority under this act, by any subsequent order, to command the attendance of any person to be named in such order for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order, and to give all such directions as to the time, place, and manner of such examination, and all other matters connected therewith, as may appear reasonable and just, and any such order may be enforced, and any disobedience thereof punished, in like manner

Order for
examination
of witnesses
out of the
jurisdiction
in relation to
any suit
pending
before any
tribunal
in Her
Majesty's
possessions.

as in case of an order made by such court or Judge in a cause depending in such court or before such Judge.

Penalty on persons giving false evidence.

II. Every person examined as a witness under any such commission, order, or other process as aforesaid, who shall upon such examination wilfully and corruptly give any false evidence, shall be deemed and taken to be guilty of perjury.

Payment of expenses.

III. Provided always, that every person whose attendance shall be so ordered shall be entitled to the like conduct money, and payment for expenses and loss of time, as upon attendance at a trial.

Power to persons to refuse to answer questions to criminate himself, or to produce documents.

IV. Provided also that every person examined under any such commission, order, or other process as aforesaid, shall have the like right to refuse to answer questions tending to criminate himself, and other questions which a witness in any cause pending in the court by which, or by a Judge whereof, or before the Judge by whom the order for examination was made, would be entitled to ; and that no person shall be compelled to produce under any such order as aforesaid any writing or other document that he would not be compellable to produce at a trial of such a cause.

Certain courts and Judges to have authority under this act.

V. Her Majesty's Superior Courts of Common Law at *Westminster* and in *Dublin* respectively, the Court of Session in *Scotland*, and any supreme court in any of her Majesty's colonies or possessions abroad, and any Judge of any such court, and every Judge in any such colony or possession who, by any order of her Majesty in Council may be appointed for this purpose, shall respectively be courts and Judges having authority under this act.

Power to Judges to frame rules, &c., for giving effect to provisions of this act.

VI. It shall be lawful for the Lord Chancellor of *Great Britain* with the assistance of two of the Judges of the Courts of Common Law at *Westminster*, so far as relates to *England*, and for the Lord Chancellor of *Ireland*, with the assistance of two of the Judges of the Courts of Common Law at *Dublin*, so far as relates to *Ireland*, and for two of the Judges of the Court of Session, so far as relates to *Scotland*, and for the chief or only Judge of the supreme court in any of Her Majesty's colonies or possessions abroad, so far as relates to such colony or possession, to frame such rules and orders as shall be necessary or proper for giving effect to the provisions of this act, and regulating the procedure under the same.

32 & 33 VICT. CHAP. 68.

An Act for the further amendment of the Law of Evidence.

[9th Aug., 1869.]

Whereas the discovery of truth in Courts of Justice has been signally promoted by the removal of restrictions on the admissibility of witnesses, and it is expedient to amend the law of evidence with the object of still further promoting such discovery : Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

I. The fourth section of chapter ninety-nine of the statutes passed in the fourteenth and fifteenth years of her present Majesty, and so much of the second section of the "Evidence Amendment Act, 1853," as is contained in the words "or in any proceeding instituted in consequence of adultery," are hereby repealed.

Sect. 4, of 14 & 15 Vict. c. 89, and part of sect. 2, of 16 & 17 Vict. c. 83. repealed.

II. The parties to any action for breach of promise of marriage shall be competent to give evidence in such action : provided always, that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise.

Parties in actions for breach of promise of marriage.

III. The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties shall be competent to give evidence in such proceeding : provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery.

Parties and their husbands and wives to be witnesses in suits for adultery.

IV. If any person called to give evidence in any Court of Justice, whether in a civil or criminal proceeding, shall object to take an oath, or shall be objected to as incompetent to take an oath, such person shall, if the presiding Judge is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration :

Persons objecting to take oath may be allowed to make declaration, and be liable for perjury.

"I solemnly promise and declare that the evidence given by me to the Court shall be the truth, the whole truth, and nothing but the truth."

And any person who, having made such promise and declaration, shall wilfully and corruptly give false evidence, shall be liable to be indicted, tried, and convicted for perjury as if he had taken an oath.

V. This Act may be cited for all purposes as the "Evidence Further Amendment Act, 1869."

Short title. Extent of Act.

VI. This Act shall not extend to Scotland.

APPENDIX.

PART III.

CONSISTING OF STATUTES RELATING TO PROCEDURE AND GENERAL MATTERS.

3 & 4 VICT. CHAP. CV.

An Act for abolishing Arrest on Mesne Process in civil Actions, except in certain Cases; for extending the Remedies of Creditors against the Property of Debtors; and for the further Amendment of the Law and the better Advancement of Justice in Ireland.

[10th August, 1840.]

Whereas the present power of arrest upon mesne process in Ireland is unnecessarily extensive and severe, and ought to be relaxed: and whereas it is expedient that certain provisions of Acts of Parliament in force in England in relation to actions in Courts of Common Law, and to process and proceedings therein, should be extended to Ireland: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the time appointed for the commencement of this act no person shall be arrested upon mesne process in any civil action in any Inferior Court whatsoever, or (except in the cases and in the manner hereinafter provided for) in any Superior Court.

Arrest on mesne process abolished, except in certain cases.

A Judge of a Superior Court may order defendant to be arrested in certain cases.

II. And be it enacted, that if a plaintiff in any action in any of her Majesty's Superior Courts of Law at Dublin, in which the defendant is now liable to arrest, whether upon the order of a Judge or without such order, shall, by the affidavit of himself or of some other person, show to the satisfaction of a Judge of one of the said Superior Courts, that such plaintiff has a cause of action against the defendant or defendants to the amount of twenty pounds or upwards, or has sustained damage to that amount, and that there is probable cause for believing that the defendant or any one or more of the defendants is or are about to quit Ireland unless he or they be forthwith arrested or held to special bail, it shall be lawful for such judge, by a special order, to direct that such defendant or defendants so about to

quit Ireland shall be held to bail for such sum as such Judge shall think fit, not exceeding the amount of the debt or damages so sworn to as aforesaid ; and thereupon it shall be lawful for such plaintiff, within the time which shall be expressed in such order, but not afterwards, to sue out one or more writ or writs of *capias* into one or more different counties, as the case may require, against any such defendant so directed to be held to bail, which writ of *capias* shall have marked at the foot thereof or endorsed thereon the sum for which such defendant shall be so ordered to be arrested or held to bail, and the said writ shall have subscribed at the foot thereof the memorandum and warning, and shall have endorsed thereon the several endorsements in the form in the schedule (A.) to this Act annexed, and shall bear date on the day on which the same shall be issued, and be returnable into the Court out of which such writ shall have issued, according to the practice of such Court.

III. And be it enacted, that the sheriff or other officer to whom any such writ of *capias* shall be directed shall, before the expiration of the return of the said writ, within one calendar month after the date thereof, including the day of such date, but not afterwards, proceed to arrest the defendant thereupon ; and such defendant when so arrested shall remain in custody until he shall have given a bail bond to the sheriff, or shall have made deposit of the sum endorsed on such writ of *capias*, together with ten pounds for costs, according to the practice of the said superior courts ; and all subsequent proceedings as to the putting in and perfecting special bail, or of making deposit and payment of money into Court instead of putting in and perfecting special bail, shall be according to the like practice of the said superior courts, or as near thereto as the circumstances of the case will admit.

Sheriff may proceed to arrest defendant.

Defendant to remain in custody until he finds bail, or makes a deposit.

IV. And be it enacted, that any such special order may be made and the defendant arrested in pursuance thereof at any time after the commencement of such action, and before final judgment shall have been obtained therein.

Order may be made at any time before final judgment.

V. And be it enacted, that it shall be lawful for any person arrested upon any such writ of *capias* to apply at any time after such arrest to a Judge of one of the superior courts at *Dublin*, or to the Court in which the action shall have been commenced, for an order or rule on the plaintiff in such action to show cause why the person arrested should not be discharged out of custody ; and that it shall be lawful for such Judge or Court to make absolute or discharge or refuse such order or rule, and to direct the costs of the application to be paid by either party, or to make such other order therein as to such Judge or Court shall seem fit ; provided that any such order made by a Judge may be discharged or varied by the Court, on application made thereto by either party dissatisfied with such order.

Defendant may apply for his discharge forthwith.

Judge may discharge defendant or not.

Order of Judge may be appealed from.

Warrants of attorney or *cognovit actionem* to be executed in the presence of an attorney on behalf of the person except warrants collateral with bonds.

X. And whereas it is expedient that provision should be made for giving every person executing a warrant of attorney to confess judgment, or a *cognovit actionem* (save as hereinafter mentioned) due information of the nature and effect thereof; be it enacted, that from and after the time appointed for the commencement of this act no warrant of attorney to confess judgment in any personal action, or *cognovit actionem* given by any person, save and except a warrant of attorney to confess judgment in an action upon a bond or writing obligatory recited therein or collateral therewith, shall be of any force unless there shall be present some attorney of one of the superior courts on behalf of such person, expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or *cognovit*, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney.

Warrants, &c., not formally executed invalid.

XII. And be it enacted, that a warrant of attorney to confess judgment or *cognovit actionem* (save and except as aforesaid) not executed in manner aforesaid, shall not be rendered valid by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same.

Defeasance of warrant of attorney, &c., to be written on the same paper.

XIV. And be it enacted, that if such warrant of attorney shall be given subject to any defeasance or condition, such defeasance or condition shall be written on the same paper on which such warrant of attorney shall be written, before the time when the same, or a copy thereof respectively, shall be filed, otherwise such warrant of attorney shall be null and void to all intents and purposes.

Officer of Court to keep a book containing list and particulars of each warrant of attorney.

XV. And be it enacted, that the said officer of the said court in which such warrant of attorney or copy thereof shall be filed shall cause every such warrant of attorney in any personal action, and every copy thereof filed in his said office, to be numbered, and shall keep a book or books in his said office in which he shall cause to be fairly entered an alphabetical list of every such warrant of attorney, containing therein the names and additions and descriptions of the respective defendants or persons giving such warrants of attorney, and also the names, additions, and descriptions of the plaintiffs or persons in whose favour the same shall have been given, together with the number and dates of the execution, and filing of the same, or of a copy thereof respectively, and the sums for which judgment is to be entered up, and also the sums which are specified to be paid by the defeasance or conditions in each warrant of attorney, and the times when the same are thereby made payable, according to the form contained in the schedule (B.) to this act annexed, which said book or books, and every warrant of attorney or copy thereof, filed in

the said office, shall be searched and viewed by all persons at all seasonable times, paying for every search against each person executing such warrant of attorney the sum of sixpence, and no more.

XVI. And be it enacted, that there shall be paid for filing and entering such warrant of attorney, or a copy thereof as aforesaid, the sum of one shilling and no more.

Fee for filing warrant.

XVII. And be it enacted, that any person shall be entitled to have an office copy of each warrant of attorney, or of the copy thereof, filed as aforesaid, in like manner as office copies of judgments in each such court respectively.

Office copy had on paying for.

XVIII. And be it enacted that it shall be lawful for any of the Judges of the Court in which the said warrant of attorney or copy thereof is filed to order a memorandum of satisfaction to be written upon such warrant of attorney, or copy thereof respectively as aforesaid, if it shall appear to him or them that the debt for which such warrant of attorney is given as a security shall have been satisfied or discharged.

Satisfaction to be entered on warrant of attorney.

XXVI. And be it enacted that every judgment debt due upon any judgment not confessed or recovered for any penal sum for securing principal and interest shall carry interest at the rate of four pounds *per centum per annum* from the time of entering up the judgment, or from the time of the commencement of this act in cases of judgments then entered up and not carrying interest, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment.

Judgment debts to carry interest.

XXVII. And be it enacted that all decrees and orders of the Court of Chancery, and of the Court of Exchequer at the Equity side thereof, and all rules of any of the superior Courts of Common Law, and all orders of the Lord Chancellor or Master of the Rolls, or of the Court of Commissioners of Bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior Courts of Common Law, and the persons to whom any such monies or costs, charges or expenses, shall be payable shall be deemed judgment creditors within the meaning of this act; and all powers hereby given to the Judges of the superior Courts of Common Law with respect to matters depending in the same Courts shall and may be exercised by the Courts of Chancery and Exchequer at the Equity side thereof with respect to matters therein depending, and by the Lord Chancellor, Master of the Rolls, and Court of Commissioners of Bankruptcy respectively in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment creditors are in like manner given to persons to whom any monies or costs, charges, or expenses, are by such orders or rules respectively directed to be paid; and the date of the same, and amount due on foot thereof, shall be stated in any petition for a receiver under the

Decrees and orders of Courts of Equity, &c., to have effect of judgments.

said act of the fifth and sixth years of the reign of His late Majesty King *William* the Fourth, and this act, as in the case of a petition founded on a judgment entered or recovered in any of such superior courts of law as aforesaid.

Executors
may bring
actions for
injuries to
the real
estates of
the deceased;

XXXI. And whereas there is no remedy provided by law for injuries to the real estate of any person deceased, committed in his lifetime, nor for certain wrongs done by a person deceased in his lifetime to another in respect of his property, real or personal; for remedy thereof be it enacted, that an action of trespass or trespass on the case (as the case may be) may be maintained by the executors or administrators of any person deceased for any injury to the real estate of such person committed in his lifetime for which an action might have been maintained by such a person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person; and further, that an action of trespass or trespass on the case (as the case may be) may be maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person.

and actions
may be
brought
against
executors for
an injury to
property,
real or
personal,
by their tes-
tator.

Misnomer
not to be
pleaded in
abatement.

XL. And be it enacted, that no plea in abatement for a misnomer shall be allowed in any personal action, but that in all cases in which a misnomer would but for this act have been by law pleadable in abatement in such actions, the defendant shall be at liberty to cause the declaration to be amended, at the costs of the plaintiff, by inserting the right name upon a Judge's summons, founded on an affidavit of the right name; and in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the Judge shall think fit.

Initials of
names may
be used in
some cases.

XLI. And be it enacted, that in all actions upon bills of exchange, or promissory notes, or other written instruments, any of the parties to which are designated by the initial letter or letters or some contraction of the christian or first name or names, it shall be sufficient in every affidavit to hold to bail, and in the process or declaration to designate such persons by the same initial letter or letters, or contraction of the christian or first name or names, instead of stating the christian or first name or names in full.

XLII. And be it enacted, that no wager of law shall be here-
after allowed.

Wager of
law
abolished.

XLIII. And be it enacted, that an action of debt on simple
contract shall be maintainable in any court of Common Law
against any executor or administrator.

Action of
debt on
simple con-
tract.

XLV. And be it enacted, that from and after the first day of
January, one thousand eight hundred and forty-one, the Sheriff
of each county in *Ireland* shall severally name a sufficient deputy,
who shall be resident or have an office within one mile from the
Four Courts, *Dublin*, for the receipt of writs, granting warrants
thereon, making returns thereto, and accepting of all rules and
orders to be made on or touching the execution of any process or
writ to be directed to such Sheriff.

Sheriffs
to make
deputies to
be resident
in *Dublin*.

LIII. And be it enacted, that upon all debts or sums certain,
payable at a certain time or otherwise, the jury on the trial of
any issue, or on any inquisition of damages, may, if they shall
think fit, allow interest to the creditor at a rate not exceeding
the current rate of interest, from the time when such debts or
sums certain were payable, if such debts or sums be payable by
virtue of some written instrument at a certain time, or if payable
otherwise, then from the time when demand of payment shall
have been made in writing, so as such demand shall give notice
to the debtor that interest will be claimed from the date of such
demand until the term of payment; provided that interest shall
be payable in all cases in which it is now payable by law; and
provided also, that such interest so to be allowed by such jury
shall not be so allowed for any period exceeding six years.

Jury
empowered
to allow
interest upon
debts.

LIV. And be it enacted, that the jury on the trial of any issue,
or on any inquisition of damages, may, if they shall think fit, give
damages in the nature of interest, for any period not exceeding six
years, over and above the value of the goods at the time of the
conversion or seizure, in all actions of trover or trespass *de bonis
asportatis*, and over and above the money recoverable in all
actions on policies of assurance made after the passing of this
Act.

In certain
actions the
jury may
give damages
in the
nature of
interest.

LV. And be it enacted, that if any person shall sue out any
writ of error upon any judgment whatsoever given in any Court
in any action personal, and the Court of Error shall give judg-
ment for the defendant thereon, then interest shall be allowed by
the Court of Error for such time as execution has been delayed
by such writ of error for the delaying thereof.

Interest to
be allowed
on all writs
of error
for the
time that
execution
has been
delayed.

LVI. And be it enacted, that in every action brought by any
executor or administrator in right of the testator or intestate,
such executor or administrator shall, unless the Court in which
such action is brought, or a Judge of any of the said Superior

Executors
suing in
right of the
testator to
pay costs in
case of
non suit, &c.

Courts shall otherwise order, be liable to pay costs to the defendant in case of being nonsuited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner.

One or more of several defendants in any action having a *nolle prosequi* or a verdict, shall have costs.

LVII. And be it enacted, that where several persons shall be made defendants in any personal action, and any one or more of them shall have a *Nolle prosequi* entered as to him or them, or upon the trial of such action shall have a verdict pass for him or them, every such person shall have judgment for and recover his reasonable costs, unless, in the case of a trial, the Judge before whom such cause shall be tried shall certify upon the record, under his hand, that there was a reasonable cause for making such person a defendant in such action.

Where *nolle prosequi* entered upon any count, &c.

LVIII. And be it enacted, that where any *Nolle prosequi* shall have been entered upon any count, or as to part of any declaration, the defendant shall be entitled to and have judgment for and recover his reasonable costs in that behalf.

Plaintiff in *scire facias*, and plaintiff or defendant on demurrer, to have costs.

LIX. And be it enacted, that in all writs of *Scire facias* the plaintiff obtaining judgment on an award of execution shall recover his costs of suit upon a judgment by default, as well as upon a judgment after plea pleaded or demurrer joined; and that where judgment shall be given either for or against a plaintiff or defendant, or for or against a defendant or tenant, upon any demurrer joined in any action whatever, the party in whose favour such judgment shall be given shall also have judgment to recover his costs in that behalf.

Costs of special juries in case of nonsuit.

3 & 4 W. 4. c. 91.

LX. And whereas it is provided in and by a statute passed in the session of Parliament held in the third and fourth years of the reign of his late Majesty King William the Fourth, intituled *An Act for consolidating and amending the law relative to Jurors and Juries in Ireland*, that the person or party who shall apply for a special jury shall pay the fees for striking such jury, and all the expenses occasioned by the trial of the cause by the same, and shall not have any further or other allowance for the same, upon taxation of costs, than such person or party would be entitled unto in case the cause had been tried by a common jury, unless the Judge before whom the cause is tried shall, immediately after the verdict, certify under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury: and whereas the said provision does not apply to cases in which the plaintiff has been nonsuited, and it is expedient that the Judge should have such power of certifying as well when a plaintiff is nonsuited as when he has a verdict against him; be it therefore enacted, that the said provision of the said last-mentioned Act of Parliament, and everything therein contained shall apply to cases in which the plaintiff shall be non-

sued as well as to cases in which a verdict shall pass against him.

LXIII. And whereas it is expedient to render references to arbitration more effectual; be it enacted, that the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of Court, or Judge's order, or order of *Nisi Prius*, in any action now brought, or which shall be hereafter brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of her Majesty's Courts of Record, shall not be revocable by any party to such reference, without the leave of the Court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a Judge; and the arbitrator or umpire shall and may and is hereby required to proceed with the reference, notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and that the Court, or any Judge thereof, may from time to time enlarge the term for any such arbitrator making his award.

Submission to arbitration by rule of court, &c. not to be revocable without leave of the court.

LXIV. And be it enacted, that when any reference shall have been made by any such rule or order as aforesaid, or by any submission containing such agreement as aforesaid, it shall be lawful for the Court by which such rule or order shall be made, or which shall be mentioned in such agreement, or for any Judge, by rule or order to be made for that purpose, to command the attendance and examination of any person to be named or the production of any documents to be mentioned in such rule or order; and the disobedience to any such rule or order shall be deemed a contempt of Court if, in addition to the service of such rule or order, an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators, or by the umpire, before whom the attendance is required, shall also be served either together with or after the service of such rule or order; provided always, that every person whose attendance shall be so required shall be entitled to the like conduct money, and payment of expenses and for loss of time, as for and upon attendance at any trial; provided also, that the application made to such Court or Judge for such rule or order shall set forth the county where such witness is residing at the time, or satisfy such Court or Judge that such person cannot be found; provided also, that no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compelled to produce at a trial, or to attend at more than two consecutive days, to be named in such order.

Power to compel the attendance of witnesses.

LXV. And be it enacted, that when in any rule or order of reference, or in any submission to arbitration containing an agreement that the submission shall be made a rule of Court, it shall be ordered or agreed that the witnesses upon such re-

Power for the arbitrators under a rule of court to administer an oath.

ference shall be examined upon oath, it shall be lawful for the arbitrator or umpire, or any one arbitrator, and he or they are hereby authorized and required, to administer an oath to such witnesses, or to take their affirmation in cases where affirmation is allowed by law instead of oath; and if upon such oath or affirmation any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly.

LXVI. And whereas great difficulties and delays may be experienced, and sometimes a failure of justice may take place, in actions depending in Courts of law in *Ireland*, by reason of the want of a competent power or authority in the said Courts to order and enforce the examination of witnesses, when the same may be required, before the trial of a cause: and whereas by an Act passed in the Parliament of *Great Britain* in the thirteenth year of the reign of his late Majesty King *George* the Third, intituled *An act for the establishing certain Regulations for the better Management of the affairs of the East India Company as well in India as in Europe*, certain powers are given and provisions made for the examination of witnesses in *India* in the cases therein mentioned: and whereas by an act passed in the first year of the reign of His late Majesty King *William* the Fourth, intituled *An act to enable Courts of Law to order the examination of witnesses upon interrogatories and otherwise*, further provisions were made in relation to the examination of witnesses in all colonies, islands, plantations, and places under the dominion of the Crown of *England* in Foreign parts: and whereas it is expedient to extend to *Ireland* certain provisions of the said two last-mentioned recited acts; be it therefore enacted, that all and every the powers, authorities, provisions and matters contained in the said recited act of the thirteenth year of the reign of His said late Majesty King *George* the Third, relating to the examination of witnesses in *India* shall be and the same are, with reference to all actions in any of Her Majesty's Courts of Law at *Dublin*, hereby extended to all colonies, islands, plantations, and places under the dominion of Her Majesty in foreign parts, and to the Judges of the several courts therein, and to all actions depending in any of Her Majesty's Courts of Law at *Dublin*, in what place or county soever the cause of action may have arisen within the jurisdiction of the court to the Judges whereof the writ or commission may be directed, or elsewhere, when it shall appear that the examination of witnesses under a writ or commission issued in pursuance of the authority hereby given will be necessary or conducive to the due administration of justice in the matter wherein such writ shall be applied for.

13 G. 3. c.
63.

1 W. 4. c.
22.

Powers of
the recited
acts
extended to
all actions in
the courts
at *Dublin*,
when exam-
ination by
commission
shall appear
necessary.

LXVII. And be it enacted, when any writ or commission shall issue under the authority of the said last-mentioned act and of this act, or of the power hereinbefore given by this act, the Judge or Judges to whom the same shall be directed shall have the like power to compel and enforce the attendance and examination of witnesses as the Court whereof they are Judges does or may possess for that purpose in suits or causes depending in such court.

Judges to whom the commission is directed empowered to enforce the attendance of witnesses.

LXVIII. And be it enacted, that the costs of every writ or commission to be issued under the authority of the said last-mentioned act and of this act, or of the power hereinbefore given by this act, in any action at law depending in either of the said Courts at *Dublin*, and of the proceedings thereon, shall be in the discretion of the court issuing the same.

Costs of writs to be in the discretion of the Court.

LXIX. And be it enacted, that it shall be lawful to and for each of the said courts at *Dublin*, and the several Judges thereof, in every action depending in such Court, upon the application of any of the parties to such suit, to order the examination on oath, upon interrogatories or otherwise, before the Prothonotary or Clerk of the Pleas respectively of the said court, or other person or persons to be named in such order, of any witnesses within the jurisdiction of the court where the action shall be depending, or to order a commission to issue for the examination of witnesses on oath at any place or places out of such jurisdiction, by interrogatories or otherwise, and by the same or any subsequent order or orders to give all such directions touching the time, place, and manner of such examination as well within the jurisdiction of the court wherein the action shall be depending as without, and all other matters and circumstances connected with such examinations as may appear reasonable and just.

Courts at *Dublin* may order the examination of witnesses within their jurisdiction by an officer of the Court, or may order a commission for that purpose out of their jurisdiction.

LXX. And be it enacted, that when any rule or order shall be made for the examination of witnesses within the jurisdiction of the court wherein the action shall be depending by authority of this act, it shall be lawful for the Court, or any Judge thereof, in and by the first rule or order to be made in the matter, or any subsequent rule or order, to command the attendance of any person to be named in such rule or order for the purpose of being examined, or the production of any writings or other documents to be mentioned in such rule or order, and to direct the attendance of any such person to be at his own place of abode or elsewhere, if necessary or convenient so to do; and the wilful disobedience of any such rule or order shall be deemed a contempt of Court, and proceedings may be thereupon had by attachment (the Judge's order being made a rule of Court before or at the time of the application for an attachment), if, in addition to the service of the rule or order, an appointment of the time and place of attendance in obedience thereto, signed by the person or persons appointed to take the examination, or by one or more of such

Compelling attendance of witnesses, or production of documents.

Disobedience to be deemed a contempt of Court.

Payment of Expenses.

Proviso as to production of documents.

Prisoners may be removed by habeas corpus for examination.

Examinations of witnesses to be taken upon oath.

Persons giving false evidence to be deemed guilty of perjury.

Persons appointed for taking examinations to report to the court upon the conduct or absence of witnesses if necessary.

Costs of the order for examinations may be made costs in the cause.

persons, shall be also served, together with or after the service of such rule or order ; provided always, that every person whose attendance shall be so required shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial ; provided also, that no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compellable to produce at a trial of the cause.

LXXI. And be it enacted, that it shall be lawful for any Sheriff, Gaoler, or other officer having the custody of any prisoner, to take such prisoner for examination under the authority of this act, by virtue of a writ of *habeas corpus* to be issued for that purpose, which writ shall and may be issued by any Court or Judge under such circumstances and in such manner as such Court or Judge may now by law issue the writ commonly called a writ of *habeas corpus ad testificandum*.

LXXII. And be it enacted, that it shall be lawful for all and every person authorized to take the examination of witnesses, by any rule, order, writ, or commission made or issued in pursuance of this act, and he and they are hereby authorized and required, to take all such examinations upon the oath of the witnesses, or affirmation in cases where affirmation is allowed by law instead of oath, to be administered by the person so authorized, or by any Judge of the court wherein the action shall be depending ; and if upon such oath or any affirmation any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall and may be indicted and prosecuted for such offence in the county wherein such evidence shall be given, or in the county of *Dublin*, if the evidence be given out of *Ireland*.

LXXIII. And be it enacted, that it shall and may be lawful for the Prothonotary, and any other persons to be named in any such rule or order as aforesaid for taking any examination in pursuance thereof, and he and they are hereby required to make, if need be, a special report to the Court touching such examination, and the conduct or absence of any witness or other person thereon or relating thereto ; and the Court is hereby authorized to institute such proceeding and make such order and orders upon such report as justice may require, and as may be instituted and made in any case of contempt of the Court.

LXXIV. And be it enacted, that the costs of every rule or order to be made for the examination of witnesses under any commission or otherwise by virtue of this act, and of the proceedings thereupon, shall (except in the case hereinbefore provided for) be costs in the cause, unless otherwise directed either by the Judge making such rule or order, or by the Judge before whom the cause may be tried, or by the Court.

LXXV. And be it enacted, that no examination or deposition to be taken by virtue of this act shall be read in evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the Judge that the examinant or deponent is beyond the jurisdiction of the court, or dead, or unable from permanent sickness or other permanent infirmity to attend the trial; in all or any of which cases the examinations, and depositions, certified under the hand of the Commissioners, Master, Prothonotary, or other person taking the same, shall and may, without proof of the signature to such certificate, be received and read in evidence, saving all just exceptions.

Restriction as to the reading of examinations or depositions without the consent of the party.

SCHEDULES TO WHICH THE ACT REFERS.

SCHEDULE (A.)

Memorandum to be subscribed to the Writ of Capias.

This writ is to be executed within one calendar month from the date thereof, including the day of such date and not afterwards.

A Warning to the Defendant.

If the defendant, having given bail on the arrest, shall omit to put in special bail as required, the plaintiff may proceed against the Sheriff, or on the bail bond.

Endorsements to be made on the Writ.

Bail for _____ pounds, by order of [naming the Judge making the order]. Dated this _____ day of _____
This writ was issued by E. F. of _____ attorney for the plaintiff [or plaintiffs] within named, who resides at _____.

Or,

This writ was issued in person by the plaintiff within named, who resides at [mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be.]

8 & 9 VICT. CHAP. CIX.

An Act to amend the Law concerning Games and Wagers.

[8th August, 1845.]

Proceedings
under feigned
issues
abolished.

XIX. And whereas many important questions are now tried in the form of feigned issues, by stating that a wager was laid between two parties interested in respectively maintaining the affirmative and the negative of certain propositions, but such questions may be as satisfactorily tried without such form, be it therefore enacted, that in every case where any Court of Law or Equity may desire to have any question of fact decided by a jury, it shall be lawful for such Court to direct a writ of summons to be sued out by such person or persons as such Court shall think ought to be such plaintiff or plaintiffs, against such person or persons as such Court shall think ought to be defendant or defendants therein, in the form set forth in the second schedule to this Act annexed, with such alterations or additions as such Court may think proper: and thereupon all the proceedings shall go on and be brought to a close in the same manner as is now practised in proceedings under a feigned issue.

SCHEDULE 2.

In the Court of Queen's Bench [“Common Pleas” or “Exchequer” or in any inferior Court as the case may be] Middlesex to wit [or such other county as may be directed.]

Whereas A. B. affirms, and C. D. denies [here state fully the fact or facts in issue], and the Lord Chancellor [or such other Court, etc.], is desirous of ascertaining the truth by the verdict of a jury, and both parties pray that the same may be inquired of by the country: Now let a jury, etc.

9 & 10 VICT. CHAP. LXIV.

An Act to enable Courts of Law in Ireland to give relief against adverse claims made upon persons having no interest in the subject matter of such claims.

[18th August, 1846.]

Whereas it often happens that a person sued at law for the recovery of money or goods wherein he has no interest, and

which are also claimed of him by some third party, has no means of relieving himself from such adverse claims but by a suit in equity against the plaintiff and such third party, usually called a bill of interpleader, which is attended with expense and delay; for remedy thereof be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, that upon application made by or on the behalf of any defendant sued in any of Her Majesty's Courts of Law at *Dublin* in any action of assumpsit, debt, detinue, or trover, such application being made after declaration and before plea by affidavit or otherwise, showing that such defendant does not claim any interest in the subject matter of the suit, but that the right thereto is claimed or supposed to belong to some third party who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into Court or to pay or dispose of the subject matter of the action in such manner as the Court or any Judge thereof may order or direct, it shall be lawful for the Court or any Judge thereof to make rules and orders calling upon such third party to appear and to state the nature and particulars of his claim, and maintain or relinquish his claim, and upon such rule or order to hear the allegations as well of such third party as of the plaintiff, and in the meantime to stay the proceedings in such action, and finally to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issue or issues, and also to direct which of the parties shall be plaintiff or defendant on such trial, or, with the consent of the plaintiff and such third party, their counsel or attornies, to dispose of the merits of their claims, and determine the same in a summary manner, and to make such other rules and orders therein as to costs and all other matters as may appear to be just and reasonable.

Upon application by a Defendant in an action of Assumpsit, &c., stating that the right in the subject matter is in some third party, the Court may order such third party to appear, &c., and in the meantime proceedings in such action to be stayed. 1 & 2 Wm. 4., ch. 58, s. 1.

There was a process of interpleader at Common Law, but it had a very narrow range of application, being confined to cases of joint bailments (Story's Eq. Jur. § 801); and it had, long prior to the present statute, fallen into entire disuse (*ib.* § 805). Under those circumstances the only remedy of a person sued by two or more adverse claimants, in respect of a matter in which he claimed no interest, was by filing a bill in equity to compel them to interplead. The remedy in equity was, however, only applicable when the adverse claims were connected by reason of one being derived from the other, or of both being derived from a common source; and it was further necessary that the party seeking relief should not be under a special obligation to either of the parties. Thus, an agent could not file an interpleader bill against his principal and a person claiming by a title wholly adverse and distinct. It was also essential that the person by whom a bill of interpleader was filed, should be in such a posi-

Interpleader at Common Law.

In equity.

Applicable only where claims connected and no special obligations.

By Sheriff. tion as to be able to admit the title of either claimant. Thus a sheriff who seized goods in execution could not maintain a bill on account of the existence of adverse claims to the property; for as to one of the claimants he should necessarily admit himself to be a wrong doer (Story's Eq. Jur. § 821).

Interpleader by statute. When allowed. Under the present statute, however, courts of law have power to give relief when adverse claims are made to property or money in the possession of a party who does not claim any interest in it, or where a debt (the existence of which is not denied) is claimed by two or more, and subject to the limitations afterwards mentioned such relief will be granted. Thus, where money had been deposited by the plaintiff *dum sola* with the defendants, for which she brought an action, and A alleging that the plaintiff had since been married to him, claimed the money, an interpleader order was granted (*Crellin v. Leyland*, 6 Jur. 733). So, also, where the defendant agreed with B for his maintenance at a hotel which he believed B to be the owner of, and who ostensibly conducted himself as such; and before payment the plaintiff served defendant with a notice stating that he was the owner of the hotel, and cautioning him against paying B, and then brought an action, it was held to be a fit case for an interpleader (*Gill v. Scrope*, 2 Ir. Jur. O. S. 182). Where A consigned goods to B, who sold them to C, and B became bankrupt, whereupon his assignees sued C for the price of the goods, it was held that C was entitled to the benefit of the statute (*Johnson v. Shaw*, 4 M. & G. 916). Where actions were commenced by two persons claiming to be lawful owners of a bill of exchange, the Court directed an issue (*Regan v. Serle*, 9 Dowl. 193).

Limitation to right. The right to relief is however subject to several limitations, some arising from the express provisions of the statute, and others from the principles applied by Courts of Equity to interpleader cases, and which have to a certain extent been adopted by the Courts of law. Thus the statute requires (1) that the application be made by a defendant sued in assumpsit, debt, detinue, or trover. It is therefore necessary that the defendant should be actually sued (*Parker v. Linnett*, 2 Dowl. 562); and although the forms of action have been abolished, yet the subject matter of the action in respect of which the interpleader is sought, must be such as might have been sued for in one of the specified forms. An action for unliquidated damages is not therefore within the act (*Walter v. Nicholson*, 6 Dowl. 517. (2) It is also necessary that the defendant should not claim any interest in the matter in dispute. Thus a wharfinger claiming a lien on goods, is not within the act (*Braddick v. Smith*, 9 Bing. 84). Compare with this case *Best v. Hays*, 3 F. & F. 113; *Cotter v. Bank of England*, 3 M. & Scott, 180; from the latter of which cases it would appear that a claim of lien as against the owner, whoever he may be, does not prevent the act applying, but where made against the plaintiff only it is fatal. (3) The right to the matter in dispute must be claimed by, or supposed to belong to some third party, who has sued or is expected to sue for the same. It is therefore necessary that the claims of both parties be in respect of the very same matter. Thus the statute does not apply to the case of the party sued by one person for the price of goods, and by another for the goods themselves (*Slaney v. Sidney*, 14 M. & W. 800). Where, however, E hired a farm, which he allowed his son to manage, and the defendant served the son with notice to quit,

Defendant must be sued. In what actions allowed. Defendant must claim no interest. There must be an adverse claim. Claims must be in respect of same matter.

and a valuation of the tenant-right was made by valuers appointed by the son and the defendant, whereupon E served the defendant with a notice to pay the amount of the valuation to no one but himself, it was held to be a fit case for an interpleader, and that if E was dissatisfied with the valuation, he might apply to the Court for relief (*Evans v. Wright*, 13 W. R. 468). For the same reason the claims of both claimants must be legal (*Hurst v. Sheldon*, 13 C. B., N. S. 750; *Roach v. Wright*, 8 M. & W. 155). Where an action was brought by an executor upon a policy of assurance, it was held that the defendants were not entitled to an interpleader order, merely because other parties claimed an interest in the policy (*Bewan v. Britannia Insurance Co.*, 9 Ir. C. L. R. Ap. 26); but the decision of the Court in that case seems to have proceeded upon the ground of the proceedings having been only threatened and not instituted. In *Putney v. Tring*, 5 M. & W. 425, it was considered that the fact of one of the claims being of an equitable nature, was no ground for refusing relief. (4) It is furthermore necessary that there should be no collusion between the defendant and the third party. And not only must there be no collusion, but the defendant must, moreover, not have placed himself by his own act in a situation to be sued, as for instance by voluntarily becoming a stakeholder with a view to forward the claimant's interest (*Belcher v. Smith*, 9 Bing. 82; and see further *Horner v. Willcocks*, 1 Ir. Jur. O. S. 136). Where a defendant has been indemnified by a third party for not delivering up property in his possession, he has no right to relief (*Tucker v. Morris*, 1 Cr. & M. 73). (5) The statute further requires that the defendant should be ready to bring into Court, or to pay or dispose of the subject-matter of the action in such a manner as may be directed. He must therefore be in possession of the matter in dispute, and where a part of a sum claimed had been paid to one of the claimants before adverse claim made, it was held that the adverse claimant had a right to have the whole sum paid into Court, on the holder applying for relief. (*Allen v. Gilbey*, 3 Dowl. 143; and see *Inland v. Bushell*, 2 H. & W. 118). (6) The statute provides that the claimant shall be made defendant in the action, or a feigned issue directed. It has accordingly been held that the question between the plaintiff and defendant must be such as to be capable of being disposed of in the issue between the plaintiff and the claimant. On this ground, where the defendants had accepted a bill payable to a married woman, who endorsed it to the plaintiff, and afterwards the husband, who had remitted the bill, gave notice to the defendants not to pay it, it was held that the case was not within the Act, for on an issue between the plaintiff and the husband, the question of the defendants being estopped from denying the wife's power to endorse would not arise (*Baker v. The Bank of Australasia*, 1 C. B., N. S. 515; and see further *Farr v. Ward*, 2 M. & W. 844).

In addition to the several requisites referred to as necessary to ground a case for relief, the courts of law after the introduction of the above and the corresponding English act, held that the right of a party to relief was subject to the same limitations as were applied by Courts of Equity in administering equitable relief. Thus as above-mentioned courts of equity require as a condition to giving relief that the title of both claimants should have a common origin, i.e., that one should claim through the other, or both from a common source. Thus where the defendant offered a reward to whoever would give information, and the reward was

Both claims must be legal.

Collusion.

Defendant must be ready to bring money into Court.

The claims must be disposable of in the action.

Whether claims must have a common origin.

claimed by several, the court refused to make an interpleader order (*Grant v. Fry*, 5 Dowl. 135; *Collis v. Lee*, 1 Hodg. 204); see, however, *Gay v. Pittman*, 1 Jur. 775. So also where the plaintiff sold to the defendant a rick of hay belonging to a deceased person, and the price was afterwards claimed by the person who had taken out administration to the deceased, it was held not to be a case for an interpleader (*James v. Pritchard*, 7 M. & W. 216). It will, however, be observed that there is nothing in the act limiting the jurisdiction of the Courts of Common Law to cases where both claimants claim through a common title, unless the reference to proceedings by suit in equity can be considered as having that effect; and subsequent cases have thrown considerable doubt upon the correctness of the decision referred to (see *Best v. Hayes*, 1 H. & C., 718; *Tanner v. European Bank*, L.R., 1 Ex., 261, 263). It should, moreover, be remembered that the ground on which courts of equity declined to interfere in such cases is, that by so doing they would be asserting a right to try mere legal titles (see Story's Eq. Jur., sec. 816, 820), an objection which should not be of any weight in a court of law. In England it is now expressly provided by the C. L. P. Act, 1860, sec. 12, that the fact of the claims not having a common origin shall be no bar to relief; and upon the whole it would appear that unless the earlier cases are to be considered as having settled the practice, the fact of the claims not having a common origin should be no bar to relief unless in such cases as *Baker v. The Bank of Australasia*, referred to ante p. cix., where the defendant is under different liabilities to both claimants which cannot be adjusted in an action or issue between the claimants.

Whether
applicable
where special
obligation.

Again on the principle that courts of equity would not interfere where there was any special obligation existing between the defendant and one of the claimants, it has been held that where an action is brought by bailor against bailee no interpleader should be granted (*Scott v. The Midland Gt. W. Rly. Co.*, 2 Ir. C. L. R., 83; *Horton v. Devon*, 4 Ex., 497; *Lindsey v. Barron*, 6 C. B., 291). The propriety of those decisions has, however, been questioned (*Best v. Bayes*, 1 H. & C., 718; *Meynell v. Angell*, 8 Jur., N. S., 1211; *Roberts v. Bell*, 7 E. & B., 323; *Tanner v. European Bank*, L. R., 1 Ex. 261). In the latter case A sued the defendants to whom he had entrusted a policy for certain specified purposes, and declared in trover and detinue, and specially on the contract. B who had pledged the policy with A then brought an action against the same defendants for the recovery of the policy. An interpleader order was made, directing that the proceedings in the first action should be stayed till further order, that A should be at liberty to defend the second action, indemnifying the defendants, and that B should give the defendants security for costs; and it was held on appeal that the order was rightly made; and see further the observations on the end of the last paragraph.

Procedure.

Summoning
order.

As to the procedure in cases when an order is sought for under this section, the defendant must apply to the Court or Judge for a summoning order upon an affidavit setting out the several matters specified in the section. The application should be (it would appear) *ex parte* in the first instance. It must be made before defence, but it may be obtained after an extension of the time to plead (*Barnes v. Bank of England*, 1 W. W. & H., 50). Where two actions have been brought in different courts application must be made in both courts (*Allen v. Gilby*, 3 Dowl. 143). The claimant if he appears must state by affidavit the nature of his claim

(*Powell v. Lock* 3 A. & E., 315), but it seems not to be necessary for the plaintiff so to do (see *Angus v. Wootton*, 3 M. & W. 310). The judge cannot decide in a summary manner between the claimants without their consent, and if such consent be not given an issue or action must be directed, or the original action proceeded with as provided above. As to the course to be adopted when the claimant does not appear, see sec. 3 *infra*. As regards the costs between the claimants they rest in the discretion of the judge; and are disposed of afterwards, and generally in accordance with the event (*Melville v. Smark*, 3 M. & G., 57). The defendant if he acts *bonâ fide* is entitled to his costs out of the funds or the produce of the subject matter in dispute to be ultimately repaid by the unsuccessful party (*Reeves v. Barraud*, 7 Scott, 281; *Regan v. Serle*, 9 Dowl. 193; *Pitchers v. Edney*, 4 Bing, N. S. 721).

Deciding in summary manner. Issue.

Costs.

As to the course to be adopted where new claimants appear in addition to the original claimant, see *Walker v. Ker*, 7 Jur. 156; *Kirk v. Clarke*, 4 Dowl. 363; and see further as to the practice, sec 6, *infra*.

II. And be it enacted, that the judgment in any such action or issue as may be directed by the Court or Judge, and the decision of the Court or Judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them.

Judgment and decision of the Court to be final. 1 & 2 Wm. 4, c. 68, sec. 2.

III. And be it enacted, that if such third party shall not appear upon such rule or order to maintain or relinquish his claim, being duly served therewith, or shall neglect or refuse to comply with any rule or order to be made after appearance, it shall be lawful for the Court or Judge to declare such third party, and all persons claiming by, from, or under him, to be for ever barred from prosecuting his claim against the original defendant, his executors or administrators, saving nevertheless the right or claim of such third party against the plaintiff, and thereupon to make such order between such defendant and the plaintiff as to costs and other matters as may appear just and reasonable.

If such third party shall not appear, etc., Court may bar his claim against the original Defendant.

Saving rights of such third party against Plaintiff. 1 & 2 Wm. 4, c. 68, sec. 3.

See *Ford v. Dillon*, 2 N. and M. 662; *Lucas v. London Dock Co.* 4 B. and Ad. 378; *Donniger v. Hinzman*, 2 Dowl. 424.

IV. Provided always, and be it enacted, that every order to be made in pursuance of this Act by a single Judge not sitting in open Court shall be liable to be rescinded or altered by the Court in like manner as other orders made by a single Judge.

Orders made by a single Judge liable to be rescinded by Court. 1 & 2 Wm. 4, c. 68, s. 4.

V. Provided also, and be it enacted, that if upon application to a Judge in the first instance, or in any later stage of the proceedings, he shall think the matter more fit for the decision of the Court, it shall be lawful for him to refer the matter to the Court,

If a Judge think fit, he may refer the matter for the deci-

sion of the
Court. 1 & 2
Wm. 4.,
c. 58, s. 5.

and thereupon the Court shall and may hear and dispose of the same in the same manner as if the proceeding had originally commenced by rule of Court instead of the order of a Judge.

For relief
and protec-
tion of Sher-
iffs and
other officers
employed in
execution of
process
against goods
and chattels.
1 & 2 Wm. 4.,
c. 58, s. 6.

VI. And whereas difficulties sometimes arise in the execution of process against goods and chattels issued by or under the authority of the said Courts, by reason of claims made to such goods and chattels by assignees of bankrupts and other persons not being the parties against whom such process has issued, whereby Sheriffs and other officers are exposed to the hazard and expense of actions, and it is reasonable to afford relief and protection in such cases to such Sheriffs and other officers; be it therefore enacted, that when any such claim shall be made to any goods or chattels taken or intended to be taken in execution under any such process, or to the proceeds or value thereof, it shall and may be lawful to and for the Court from which such process issued, or any Judge of such Court, upon application of such Sheriff or other officer made before or after the return of such process, and as well before as after any action brought against such Sheriff or other officer, to call before them or him, by rule of the Court or Judge, as well the party issuing such process as the party making such claim, and thereupon to exercise, for the adjustment of such claims, and the relief and protection of the Sheriff or other officer, all or any of the powers and authorities herein-before contained, and make such rules and decisions as shall appear to be just, according to the circumstances of the case; and the costs of all such proceedings shall be in the discretion of the Court or any Judge thereof.

Interpleader
by Sheriff.

Previous to the present act there was no means by which a sheriff could compel an execution creditor and a claimant to goods seized or about to be seized to interplead. The courts of equity declined to interfere in such a case, and there was no process by which the conflicting claims of the parties could be adjusted at common law. It is true that the sheriff might impanel a jury to enquire in whom the property in goods was vested (See Ch. Ar. Pr. 12th ed. p. 657), but the verdict of such a jury did not conclude the parties, the only result of it being that it had the effect of indemnifying the sheriff in making a return of *nulla bona*, or mitigated the damages in an action of trespass. The present statute has not abolished the sheriff's power of proceeding by writ of inquiry; and the court may in some cases leave the sheriff to pursue that course (*Barrett v. Butler*, 2 Ir. Jur. O.S. 32).

When Sheriff
may apply.

According to the earlier practice it seems to have been considered that a sheriff could not apply for a summoning order unless he was in actual possession of the property seized (*Molloy v. McDermott*, 2 Ir. Jur. O. S. 32; *Scott v. Lewis*, 2 C. M. & R. 289). The words of the statute are however "when a claim shall be made to goods taken or intended to be taken," and it has accordingly been held that an actual seizure is not required to give the court jurisdiction, although the court will rarely interfere except where the goods have been actually seized (*Lea v. Rossi*, 11

Ex. 13; *Day v. Carr*, 7 Ex. 883). A claim must however have been actually made to the goods (*Isaac v. Spilsbury*, 10 Bing. 3). As to the nature of the claim necessary to give jurisdiction to the court it may be either legal or equitable, provided it be a claim to the goods or their proceeds (See *Bateman v. Green*, 1r. R., 2 C. L. 166, 607). Thus an order may be applied for when a lien is claimed (*Ford v. Baynton*, 1 Dowl. 357); or where it is alleged that the debtor holds the goods not in his own right but as executor or trustee for others — as for instance for his wife (*Burke v. Rutledge*, 3 Ir. Jur. O. S. 148; *Fenwick v. Laycock*, 2 Q. B. 108; with which cases compare *Roach v. Wright*, 8 M. & W. 155); and where the landlord served a notice claiming a year's rent the court made an order (*Nixon v. Wilks*, 4 Ir. Jur. N. S. 242). In *Bateman v. Farnworth*, 29 L. J. Ex. 365, it was however held that the court has not jurisdiction under such circumstances to make an order, and see *Haythorn v. Bush*, 2 C. & M. 689. A claim of priority between two execution creditors is not within the act (*Salmon v. Jones*, 1 Dowl. 369; *Day v. Waldo*, ib. 523); neither is a claim set up in respect of an interest as a partner (*Holmes v. Mentze*, 4 A. & E. 127).

Claim must be made. What claim necessary to give jurisdiction.

When the case is within the statute, the Sheriff is entitled to call upon the execution creditor and claimants to interplead, unless he has acted dishonestly, or his conduct has prejudiced either of the parties (*Holt v. Frost*, 3 H. & N. 821). It is true that formerly it was held that if the Sheriff was placed in circumstances which gave him an interest in either side, the Court would not relieve him (*Dudden v. Long*, 1 Scott, 281); and on this ground relief has been refused where the under Sheriff was the execution creditor or the partner of the execution creditor (*Ostler v. Bower*, 4 Dowl. 605); or where the under Sheriff's partner appeared to be concerned for some of the parties (*Dudden v. Long*, *ubi supra*). In *Holt v. Frost*, it was, however, held to be no objection that the under Sheriff was the attorney of one of the claimants, and directed a claim to be made on her account, and it was said that so great a strictness does not now prevail as formerly, and that unless it be shown that one of the parties has been prejudiced, the Sheriff will be relieved. Where, however, the goods have been sold and the proceeds paid over to the execution creditor, the Sheriff cannot apply for relief (*Inland v. Bushell*, 2 H. & W. 118); neither can he where he has delivered part of the goods to the claimant (*Braine v. Hunt*, 2 Dowl. 391). The fact, however, of the Sheriff having, after seizure, been served with notice of an act of bankruptcy, and having, notwithstanding, sold, does not disentitle him to relief (*O'Neill v. O'Neill*, 5 Ir. Jur. O. S. 183). The Sheriff must in all cases, in order to entitle him to relief, apply promptly (*Mutton v. Young*, 4 C. B. 371; *Alexander v. Connell*, 11 Ir. L. R. 325).

Where Sheriff interested.

Assuming that the Sheriff is entitled to relief, he must, in the first instance, apply *ex parte* to the Court for a summoning order. The affidavit in support of the application should state the facts. It should also state that there is no collusion, although an omission in this respect is not fatal (*Donniger v. Hinzman*, 2 Dowl. 424; *Bond v. Woodhall*, 2 C. M. & R. 601). If the claimant appear to support his claim, which he must do by affidavit (*Powell v. Lock*, 3 A. & E. 315; *Campbell v. Conway*, 7 Ir. Jur. O. S. 260), and the execution creditor appear also, an issue must be directed, unless the parties consent to have the matter summarily dis-

Obtaining summoning order.

Directing issue.

- posed of (*Deehan v. Lynch*, 2 Ir. Jur. O.S. 15). The claimant is usually made plaintiff and the execution creditor the defendant in the issue. In place of directing an issue, the Court or judge may, however, direct an action of trover to be brought (*Gilhooly v. Coogan*, 5 Ir. Jur. O. S. 244). If the claimant declines to take an issue, the Court will make an order barring his claim (*Hoban v. Munroe*, Ir. R. 1 C. L. 595); and if the claimant neglects to appear, his claim will also be barred as against the Sheriff, and he will be precluded from afterwards enforcing it (*Ford v. Dillon*, 2 N. & M. 662; *Bowdler v. Smith*, 1 Dowl. 417); but in case the execution creditor does not appear, the Court cannot it seems bar his claim as against the claimant (*Donniger v. Hinzman*, 2 Dowl. 424).
- Barring claim.** The court has power under the section to restrain an action both against the sheriff and the execution creditor (*Carpenter v. Pearce*, 27 L. J. Ex. 143).
- Restraining action.**
- Effect of finding.** When an issue is directed under the act the finding upon it is conclusive between the parties, in the same manner as the finding of the jury in an ordinary case. An appeal lies from the decision of the Court in banc in cases of interpleader, in the same manner as in ordinary cases under sects. 40 & 41 of the C. L. P. Act, 1856 (*Bateman v. Green*, Ir. R. 2 C. L. 607).
- Costs of parties.** As regards the costs of the parties they rest in the discretion of the Court, and will generally be awarded to the successful party. As to the costs where the court makes an order barring the claim, see *Hoban v. Munroe*, Ir. R. 1, C. L. 595. As to the costs where the finding is partly in favour of one and partly in favour of the other claimant, see *Vanston v. Symes*, 14 Ir. C. L. R. Ap. 3, and as to the costs where a new trial is awarded, see *Doolan v. Gorman*, 6 Ir. Jur. N. S. 366. In the Exchequer the Sheriff as a general rule is allowed his costs of obtaining the interpleader order (*Gilhooly v. Grogan*, 5 Ir. Jur. O. S. 244); but in the Queen's Bench and Common Pleas he does not get them (*Cotton v. Cregan*, 4 Ir. C. L. R. 250; *Deehan v. Lynch*, 2 Ir. Jur. O. S. 15). No costs as a general rule are allowed until the termination of the proceedings (*Hood v. Bradbury*, 6 M. & G. 981). As regards the expenses incurred by the Sheriff in keeping, etc., the goods, he will in general be allowed those incurred after (*Yates v. Meehan*, 11 Ir. C. L. R. Ap. 1); but not those before the making of the summoning order (*Kelleher v. Lane*, 8 Ir. Jur. N. S. 419). In *Taaffe v. Tyrrell*, 14 Ir. C. L. R. Ap. 27, it was held that the Sheriff is entitled to get from a claimant who succeeds the expenses of keeping live stock of which he might by giving security have obtained possession; and see further as to the Sheriff's right to expenses etc. *ante* p. 150. As to enforcing security for costs, see *Hoban v. Munroe*, Ir. R. 2 C. L. 74; *Williams v. Crosling*, 3 C. B. 957; *Melin v. Dumont*, 17 W. R. 673.
- Of Sheriff.**
- Expenses.** Where an execution is levied by seizure, but the sale is suspended by an interpleader order, and before sale the execution debtor is adjudicated a bankrupt, the creditor loses the benefit of the execution (*O'Brien v. Brodie*, L. R. 1 Ex. 302). If in such a case the proceedings are discontinued the Sheriff cannot obtain the costs of the order though he has been declared entitled to them (*McDonnell v. Doherty*, 15 Ir. C. L. R. Ap. 3).
- Bankruptcy of debtor.** An execution creditor is not liable to the person whose goods have been wrongfully taken in execution for any damage sustained by him in con-
- Where goods damaged.**

sequence of their sale under an interpleader order (*Walker v. Olding*, 1 H. & C. 621). Where a Sheriff seized sheep to which a claim was made, and an issue having been directed under the interpleader act, the finding was in favour of the claimant, who thereupon sued the Sheriff for injury alleged to have been sustained by the seizure, the Court stayed the action and referred it to the Master to ascertain whether any deterioration had taken place in the value of the sheep (*Butler v. Lloyd*, 1 Ir. Jur. O. S. Ap. 80); see *O'Neill v. O'Neill*, 5 Ir. Jur. O. S. 183.

VII. And be it enacted, that all rules, orders, matters, and decisions to be made and done in pursuance of this Act, except only the affidavits to be filed, may, together with the declaration in the cause (if any), be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required and to secure and enforce the payment of costs directed by any such rule or order; and every such rule or order so entered shall have the force and effect of a judgment, except only as to becoming a charge on any lands, tenements, or hereditaments; and in case any costs shall not be paid within fifteen days after notice of the taxation and amount thereof given to the party ordered to pay the same, his agent or attorney, execution may issue for the same by fieri facias or capias ad satisfaciendum, adapted to the case, together with the costs of such entry, and of the execution if by fieri facias; and such writ and writs may bear teste on the day of issuing the same, whether in term or vacation; and the Sheriff or other officer executing any such writ shall be entitled to the same fees and no more as upon any similar writ grounded upon a judgment of the Court.

Rules, Orders, &c. made in pursuance of this Act may be entered of record, and made evidence.

Payment of costs.

As to the testing of Writs and Sheriff's fees 1 & 2 Wm. 4 c. 58, s. 7.

VIII. And be it enacted, that this Act may be amended or repealed by any Act to be passed in this present session of Parliament.

Act may be amended, &c.

9 & 10 VICT., CHAP. XCIII.

An Act for compensating the Families of Persons killed by Accidents.

[26th August, 1846.]

Whereas no action at law is now maintainable against a person who by his wrongful act, neglect, or default may have caused

An action to be maintainable against any person causing death through neglect, etc., notwithstanding the death of the person injured.

Action to be for the benefit of certain relations, and shall be brought by and in the name of executor or administrator of the deceased.

the death of another person, and it is oftentimes right and expedient that the wrong-doer in such case should be answerable in damages for the injury so caused by him : Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

II. And be it enacted, that every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought; and the amount so recovered after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties, in such shares as the jury by their verdict shall find and direct.

By 27 & 28 Vict. ch. 95 (which see *post*) where no action is brought within six months by the personal representative of the person killed, an action may be brought by the persons beneficially interested in the result of the action.

Accord and satisfaction with the deceased during his lifetime is a good answer to an action under the act (*Read v. The Great Eastern Railway Co.* L. R. 3. Q. B. 555). Where the wrongful act, neglect, or default resulting in death has also been productive of damage to the personal chattels of the deceased, the executor may maintain separate actions under this act and for the damage to the personal chattels (*Barnett v. Lucas*, Ir. R. 5 C. L. 140). It has been decided that the jury in estimating the damages to be recovered under this act, cannot take into consideration the mental suffering of the survivors, or loss of society which they have sustained, but are to award them compensation for pecuniary loss alone (*Blake v. Midland Railway Co.*, 18 Q. B. 93); and see further as to the question of pecuniary loss, *Duckworth v. Johnson*, 4 H. & N. 653; *Pym v. Great Northern Railway Co.*, 4 B. & S. 396; *Dalton v. South Eastern Railway Co.*, 4 C. B. N. S. 296; *Franklin v. South Eastern Railway Co.*, 3 H. & N. 211. Where an action was brought by a widow for damages upon the death of her son, aged fourteen, who had never earned any wages, but whose capabilities were valued at sixpence per day, the probability that he would have enabled his mother to earn more, or would have devoted part of his earnings to her support, was held to be evidence

to go to the jury upon the question of damages (*Condon v. The Great Southern and Western Railway Co.*, 16 Ir. C. L. R. 415).

III. Provided always, and be it enacted, that not more than one action shall lie for and in respect of the same subject matter of complaint; and that every such action shall be commenced within twelve calendar months after the death of such deceased person.

Only one action shall lie, and to be commenced within 12 months.

IV. And be it enacted, that in every such action the plaintiff on the record shall be required, together with the declaration, to deliver to the defendant, or his attorney, a full particular of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered.

Plaintiff to deliver a full particular of the person for whom such damages shall be claimed.

See *Murphy v. Logan*, 10 Ir. C. L. R. 87, referred to *ante* p. 10.

V. And be it enacted, that the following words and expressions are intended to have the meanings hereby assigned to them respectively, so far as such meanings are not excluded by the context or by the nature of the subject matter; that is to say, words denoting the singular number are to be understood to apply also to a plurality of persons or things; and words denoting the masculine gender are to be understood to apply also to persons of the feminine gender; and the word "person" shall apply to bodies politic and corporate; and the word "parent" shall include father and mother, and grandfather and grandmother, and stepfather and stepmother; and the word "child" shall include son and daughter, and grandson and granddaughter, and stepson and stepdaughter.

Construction of act.

The word "child" does not include an illegitimate child (*Dickenson v. North Eastern Railway Company*, 2 H. & C. 735).

VI. And be it enacted, that this act shall come into operation from and immediately after the passing thereof, and that nothing therein contained shall apply to that part of the United Kingdom called *Scotland*.

Act to take effect after passing, and not to apply to Scotland.

VII. And be it enacted, that this act may be amended or repealed by any act to be passed in this session of parliament.

Act may be amended, &c.

9 & 10 VICT. CHAP CXIII.

An Act to improve the Proceedings in Prohibition and on Writs of Mandamus in Ireland.

[28th August, 1846.]

Whereas by an Act passed in the First Year of the Reign of his late Majesty King William the Fourth intituled *An Act to improve the Proceedings in Prohibition and on Writs of Mandamus*, certain provisions were made relating to applications for writs of prohibition, and to the proceedings thereon, and to damages and costs of such applications and proceedings; and it is expedient that the said provisions should be extended to and be in force in *Ireland*: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the several enactments contained in the said statute relating to applications for writs of prohibition, and to declarations and other pleadings and proceedings thereon, and to the recovery of costs and damages therein, shall be and the same are hereby extended to and shall be in force in *Ireland*.

Provisions of
Act 1 Wm. 4, c.
21, as to
writs of pro-
hibition ex-
tended to
Ireland.

The statute of 1 Wm. 4, ch. 21, provides that applications for writs of prohibition shall be made on affidavit only, and that in case the party is directed to declare in prohibition, the declaration shall state so much only of the proceedings as may be necessary to show the ground of the application (sect. 1). The defendant may plead or demur to the declaration, and the party succeeding is entitled to costs (ib.). If the plaintiff succeeds, the jury may assess damages (ib.).

Provisions of
the Act 19 G.
2 (I.) as to
writs of
Mandamus
extended to
other cases
of writs of
Mandamus.

II. And whereas the provisions contained in an Act passed in the Parliament of *Ireland* in the Nineteenth Year of the Reign of his late Majesty King George the Second, intituled *An Act for the better regulation of Corporations*, relating to the Writs of mandamus, therein mentioned, have been found useful and convenient, and the same ought to be extended to the proceedings on other such writs; be it therefore enacted, that the several enactments contained in the said last-mentioned statute relating to the returns to writs of mandamus, and the proceedings on such returns, and to the recovery of damages and costs, shall be and the same are hereby extended and made applicable to all other writs of mandamus, and the proceedings thereon, except so far only as the same may be varied or altered by this act.

By 19 s. 2, ch. 12 (Ir.) it is provided that the person to whom the writ of *mandamus* is directed shall make his return to the first writ of *mandamus*, and that the prosecutor of the writ may plead to or traverse all or any of the material facts in the return; to which the party making the return may plead reply or demur.

III. And whereas writs of *mandamus*, other than such as relate to the offices and franchises mentioned in or provided for by the said act made in the nineteenth year of the reign of King *George* the second, are sometimes issued to officers and other persons, commanding them to admit to offices or do or perform other matters in respect whereof the persons to whom such writs are directed claim no right or interest, or whose functions are merely ministerial in relation to such offices or matters; and it may be proper that such officers and persons should in certain cases be protected against the payment of damages or costs to which they may otherwise become liable; be it therefore enacted, that it shall be lawful for the Court in *Ireland* to which application may be made for any writ of *mandamus* (other than such as relate to the said offices and franchises mentioned in or provided for by the said act made in the reign of King *George* the Second), if such Court shall see fit so to do, to make rules and orders calling not only upon the person to whom such writ may be required to issue, but also all and every other person having or claiming any right or interest in or to the matter of such writ, to show cause against the issuing of such writ, and payment of costs of the application; and upon the appearance of such other person in compliance with such rules, or in default of appearance after service thereof, to exercise all such powers and authorities, and make all such rules and orders applicable to the case, as are or may be given or mentioned by or in any act passed or to be passed during this present session of Parliament for giving relief against adverse claims made upon persons having no interest in the subject of such claims: provided always, that the return to be made to any such writ, and issues joined in fact or in law upon any traverse thereof, or upon any demurrer, shall be made and joined by and in the name of the person to whom such writ shall be directed; but nevertheless the same shall and may, if the Court shall think fit so to direct, be expressed to be made and joined on the behalf of such other person as may be mentioned in such rules, and in that case such other person shall be permitted to frame the return, and to conduct the subsequent proceedings at his own expense; and in such case, if any judgment shall be given for or against the party suing such writ, such judgment shall be given against or for the person or persons on whose behalf the return shall be expressed to be made, and who shall have the like remedy for the recovery of costs and enforcing the judgment as the person to

For protection of certain officers to whom writs of *mandamus* are directed.

Proviso as to returns of writs and issues joined.

whom the writ shall have been directed might and would otherwise have had.

Proceedings not to abate by death, &c. of the officer having made the return.

IV. And be it enacted, that in case the return to any such writ shall, in pursuance of the authority given by this act, be expressed to be made on behalf of any other person as aforesaid, the further proceedings on such writ shall not abate or be discontinued by the death or resignation of or removal from office of the person having made such return, but the same shall and may be continued and carried on in the name of such person; and if a peremptory writ shall be awarded the same shall and may be directed to any successor in office or right to such person.

The costs of application for a mandamus to be in the discretion of the Court.

V. And for making some further provision for the payment of costs on application for mandamus, be it enacted, that in all cases of applications for any writ of mandamus whatsoever in *Ireland* the costs of such application, whether the writ shall be granted or refused, and also the costs of the writ, if the same shall be issued and obeyed, shall be in the discretion of the Court, and the Court is hereby authorized to order and direct by whom and to whom the same shall be paid.

Where prosecutor intends to object to the validity of a return to a mandamus he must do so by way of demurrer.

VI. And whereas it is expedient that parties interested in the issuing of or in the proceedings upon writs of mandamus shall be enabled in certain cases to have the judgments and decisions of the Court of Queen's Bench in *Ireland* in respect of the said writs, and of the proceedings thereon, reviewed by a Court of error, if they shall so think fit, and that a certain mode of effecting the same shall be ordained and established: and whereas there is not any power or authority given by the said recited act of the reign of His Majesty King *George* the Second to the person prosecuting a writ of mandamus to demur to the return made to any such writ, so that the decision of the said Court of Queen's Bench as to the validity of such return could be reviewed by a Court of error; for remedy whereof, therefore, be it enacted, that in all cases in which the person prosecuting any writ of mandamus heretofore issued or hereafter to be issued shall wish or intend to object to the validity of any return heretofore made or hereafter to be made to the same, he shall do so by way of demurrer to the same, in such and the like manner as is now practised and used in the said Court in personal actions, and thereupon the said writ and return and the said demurrer shall be entered on record in the same Court, and such and the like further proceedings shall be thereupon had and taken as upon a demurrer to pleadings in personal actions in the said Court; and the said Court shall thereupon adjudge either that the said return is valid in law, or that it is not valid in law, or that the writ of mandamus is not valid in law; and if the Court adjudge that the said writ is valid in law, but that the return thereto is not valid in law, then and in every such case the Court shall also by the said judgment awarded that a peremptory mandamus shall issue in

Proceedings thereupon.

that behalf; and thereupon such peremptory writ of mandamus may be sued out and issued accordingly at any time after four days from the signing of the said judgment; and it shall be lawful for the said Court and they are hereby required, in and by their said judgment, to award costs to be paid to the party in whose favour they shall thereby decide, by the other party or parties.

VII. And be it enacted, that whenever any such judgment as is herein-before mentioned shall be given, or whenever issue in fact or in law shall be joined upon any pleadings, in pursuance of the said recited act of the reign of His Majesty King *George* the Second and of this act, or of either of them, and judgment shall be given thereon by the said Court, it shall be lawful for any party to the record in any of such cases, who shall think himself aggrieved by such judgment, to sue out and prosecute a writ of error for the purpose of reversing the same, in such manner and to such Court or Courts as a party to any personal action in the said Court of Queen's Bench in *Ireland* may now sue out and prosecute a writ of error upon the judgment in such action, and such and the like proceedings shall thereupon be had and taken, and such costs awarded, as in ordinary cases of writs of error upon judgments of the said Court in personal actions; and if the judgment of the said Court be reversed by the Court of error the said Court of error shall thereupon, by their judgment, not only reverse the same, but shall also, in addition thereto, give the same judgment which the Court whose judgment is so reversed ought to have given in that behalf; and if by their said judgment they shall award that a peremptory writ of mandamus shall issue, the same shall and may accordingly be issued by the proper officer in the office from which such writs issue, upon production to him of an office copy of the said judgment of the Court of error, which shall be his authority and warrant for so doing: provided always, that bail in error to the amount of fifty pounds, or such other sum as may by any rule of practice be appointed as herein-after provided, shall be duly put in within four days after the allowance of the said writ of error, and the same shall afterwards be duly perfected according to the practice of the Court wherein the said original judgment was given, otherwise the plaintiff in error shall be deemed to have abandoned his writ of error, and the same shall not be further prosecuted.

Party aggrieved by judgment may sue out a writ of error to reverse the same.

Bail in error shall be duly put in within four days after allowance of writ.

VIII. And be it enacted, that no action, suit, or any other proceeding shall be commenced or prosecuted in *Ireland* against any person or persons whatsoever for or by reason of any thing done in obedience to any peremptory writ of mandamus issued by any Court having authority to issue writs of mandamus.

No action, &c. by reason of any thing done in obedience to any peremptory writ of Court of error may make rules of practice, &c.

IX. And be it enacted, that the said Court or Courts of error which are hereby empowered to take cognizance of the matters aforesaid may make and they are hereby directed to make, from

time to time and as often as they shall see occasion, such rules of practice in reference to the said application and the proceedings thereon, and in reference to the writs of error herein-before mentioned, and the proceedings thereon, and the amount of bail to be taken, as the said Courts respectively may deem necessary to effectuate the intention of this act in relation to the same respectively.

Act may be
amended, &c.

X. And be it enacted, that this act may be amended or repealed by any act to be passed in this present session of Parliament.

11 & 12 VICT., CHAP. XXVIII.

An Act to amend the Law of Imprisonment for Debt in Ireland, and to improve the Remedies for the Recovery of Debts and of the Possession of Tenements situate in Cities and Towns, in certain Cases.

[22nd July, 1848.]

Whereas it is expedient to limit the present power of arrest for debts, damages, demands, or costs under process issuing from courts of law or equity or inferior courts in *Ireland*; be it therefore enacted by the Queen's most excellent majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, that from and after the day of the commencement of this act no writ of *capias ad satisfaciendum*, or other writ, process, or warrant to arrest the body of any defendant in any action or suit, (actions for malicious prosecution, or for deceit, libel, slander, criminal conversation, seduction, or breach of promise of marriage, only excepted,) shall be issued in *Ireland* founded on a judgment, decree, or order of any of the superior courts of law or of any inferior courts in *Ireland*, when the sum due or to be paid by or under such judgment, decree, or order, exclusive of the costs, if any, thereby recovered or ordered to be paid, shall not exceed the sum of ten pounds; nor shall any writ, process, or warrant to arrest the body of any plaintiff, defendant, or other person in any action or suit be issued, founded on any judgment, decree, or order for the recovery of costs only, when such costs due or to be paid shall not exceed the sum of ten pounds; nor shall any writ, process, or warrant issue to arrest the body of any plaintiff, defendant, or other person, founded on any decree or order of any court of equity, ecclesiastical court, or court of admiralty in *Ireland*, for the payment of money, whether consisting wholly or partly of costs or otherwise, when the sum due or to be paid shall not exceed the said sum of ten pounds.

After commencement of this Act, no writ or process for arrest shall issue from certain courts in Ireland for debts or sums not exceeding £10, save as herein excepted.

IX. And whereas it is expedient to protect the tools and actual necessities of or belonging to judgment debtors from being seized in execution: be it enacted, that from and after the passing of this act the wearing apparel and bedding of any debtor in *Ireland* under a judgment, decree, or order, or of his family, and the tools and implements of his trade not exceeding in the whole the value of five pounds, shall not be liable to seizure under any execution, decree, or order of any Court against his goods and chattels.

Tools and actual necessities of judgment debtors not to be seized in execution.

13 VICT., CHAP. XVIII.

An Act for the Regulation of Process and Practice in the superior Courts of common Law in Ireland.

[31st May, 1850.]

XIII. And be it enacted, that where proceedings in replevin shall have been instituted in any Court of inferior jurisdiction, it shall be lawful for either party to remove the same into one of the said superior Courts of Common law as heretofore: provided always, that the writs for the removal of any such proceedings shall issue out of the consolidated writ office of the said superior Courts of Common Law, instead of the writ office of the Court of Chancery; and the said superior Courts of Common Law and each of them are and is hereby authorised and empowered and declared to have authority, power, and competent jurisdiction to issue writs for such purpose, and to entertain and determine the suits so removed, and to enforce obedience to all writs by this act authorized, as fully as in the case of any other writs now issued by the said Courts.

Provision for removal of replevin suits from inferior to superior courts.

XXX. And whereas by certain acts of parliament now in force in *Ireland* provision is made for enabling any person who may think himself aggrieved by a decree or dismiss of the Recorder of *Dublin* upon any civil bill, or by a decree, dismiss, or order of the chairman of the county of *Dublin*, or by the decree of any seneschal or steward of any manor court within the county of *Dublin*, to appeal from such decree to the chief justice of her majesty's Court of Queen's Bench or Common Pleas, or to the Chief Baron of her majesty's Court of Exchequer in *Ireland*, or other justice of nisi prius, at their respective sittings at nisi prius for the city of *Dublin*; be it enacted, that from and after the commencement of this act all such appeals shall be made to the said consolidated Nisi Prius Court herein-before constituted and authorized, at the sittings thereof which shall commence or be in progress next after

Appeals to be heard by consolidated Nisi Prius Court.

the expiration of fourteen days from the day of making such decree, dismiss, or order, and shall be received and determined by the said Court at any time or times of its sittings which shall be appointed by the judge of the said Court for that purpose.

One common seal to be used for the three courts.

XL. And be it enacted, that it shall and may be lawful for the judges of said several Courts and they are hereby required to devise and adopt and cause to be prepared a fitting seal, which shall be the common seal of the three Courts, to be affixed to all writs of either Court by the Clerk of the writs, and which seal shall be in lieu of and have the same force and effect as the respective seals of the said Courts now in use.

All pleadings, &c., to be of uniform shape and dimensions.

XLI. And be it enacted that from and after the commencement of this act every pleading to be filed in any of the offices of the said courts shall be engrossed or written on vellum or parchment of uniform shape and dimensions, with a certain margin so as to admit of their being filed and kept as hereinafter directed; and that every affidavit or other proceeding usually written upon paper, and to be filed in any of the said offices, shall in like manner be of uniform shape and dimensions, and with a like margin for the like purpose; and the said judges or any seven or more of them, of whom two shall be chief judges, shall determine and by their order direct what shall be the shape and dimensions and pattern of such vellum, parchment, or paper respectively, and to what documents such regulations shall apply; and the officers of the said courts shall not receive or file any pleading, affidavit, or document which shall not be according to such regulations, and engrossed or written fairly and legibly, and in fit condition to be placed amongst the records of the Court.

Judges to fix the shape and dimensions of pleadings, &c.

Officers to file pleadings, &c. after the manner of books.

XLII. And be it enacted, that the officers whose duty it shall be to file and keep such pleadings, affidavits, and documents respectively shall file the same as they shall be received in compact order, attaching them by laces through the margin to portfolio covers after the manner of books, so that the same shall be kept free from injury and easily accessible; and that when it shall be required to make up any judgment, the attorney requiring the same shall deliver to the proper officer a correct summary or recital of the proceedings, briefly stating the several pleadings and the nature thereof, and which summary shall be written fairly on parchment, and signed by the attorney; and thereupon the officer shall take off from the pleadings file the several pleadings in the cause in which such judgment shall be required to be made up, and shall place them, together with the said summary prefixed, in consecutive order, in like manner secured by laces through the margin, upon the file of judgments, there to be kept as the permanent records of the Court.

When judgment to be made up attorney to deliver to officer a summary of pleadings;

and officer to put pleadings together on judgment file as the permanent record.

It shall not be necessary to transcribe the whole

XLIII. And be it enacted, that from and after the commencement of this act it shall not be necessary in enrolling judgments in any of the said Courts to transcribe the whole pleading as here-

tofore upon the roll, or to insert continuances or imparlances or any other fictions now used for form sake ; and that it shall in all cases of enrolling judgments be sufficient to place on the roll a correct summary or recital of the proceedings according to fact, such as herein-before directed, together with the award of judgment in proper form, with a reference to the original pleadings on the judgment file, whereby the same may be immediately found and inspected ; and no judgment so enrolled under the authority of this act shall be liable to be disturbed on the ground of error, on account of any omissions hereby authorized, upon any plea whatsoever, any law or usage to the contrary notwithstanding: provided always that if it shall be deemed necessary in any case for the prosecution of a writ of error, or for any other purpose, it shall and may be lawful for the Court to order that the whole or any part of the pleadings shall be transcribed upon the roll, and the same shall be transcribed by the proper officer.

pleadings on the judgment roll, or to insert continuances, &c., but only a summary or recital, &c.

No judgment to be disturbed on the ground of error on account of omissions hereby authorized. Proviso for cases of writs of error, &c. On filing any pleading, affidavit, &c. copy must be delivered with the notice, and, except in certain cases, attested copy shall not be necessary.

XLIV. And be it enacted, that from and after the commencement of this act, on the filing of any pleading, affidavit, document, or proceeding in any of the offices of the said Courts or either of them, of which filing in shall be necessary to serve notice, the party filing the same shall cause to be served and delivered, together with the notice thereof, a true copy of such pleading, affidavit, document, or proceeding ; and it shall not be necessary for either party to take out or produce in court or before any judge or baron in chamber an attested copy of any pleading, affidavit, document, or proceeding, a copy of which shall have been delivered, unless it shall happen that the trial, hearing, or motion upon which the copy of such pleading, affidavit, document, or proceeding shall be read or used, shall be had or made at assizes, or at any place where immediate reference cannot be had to the original pleading, affidavit, document, or proceeding on the file, in the event of the accuracy of the delivered copy being disputed ; and all paper books for the judges on law arguments, and transcripts of records for the court of error, shall be prepared and written or engrossed by the attornies or parties requiring them, under such regulations as the judges shall make in that behalf by any general order as hereinbefore provided.

XLV. And be it enacted, that any expenses which the said judges shall certify (as now required with reference to incidental expenses) to have been necessarily or properly incurred in giving effect to the provisions of this act, shall be charged and paid in like manner and as part of the incidental expenses of the said Courts.

Expenses certified as proper to be paid as part of incidental expenses.

XLVI. And be it enacted, that all persons who shall at the commencement of this act have been duly appointed as commissioners for taking affidavits or special bail in and for any one of the said superior Courts of common law shall be commissioners for, and they are hereby authorized to take affidavits or special

Commissioners for taking affidavits in one court shall be commis-

tioners for
all the law
courts;

bail in and for each of the said Courts; and the administration of all affidavits and all bail pieces taken by them or any of them by virtue hereof shall have the same force and effect to all intents and purposes as if the commissioner administering or taking the same were duly appointed by commission from each of the said Courts.

and here-
after shall be
appointed by
Court of
Queen's
Bench.

XLVII. And be it enacted, that from and after the commencement of this act no commissioner for taking affidavits or special bail for the said Courts shall be appointed except by the Court of Queen's Bench; and that each and every person appointed by the said Court as commissioner for taking affidavits or special bail shall be, by virtue of the commission issued by the Court of Queen's Bench, a commissioner duly authorized to all intents and purposes for taking affidavits or special bail in and for all the superior Courts of common law, with all the powers and privileges now by law belonging to, or hereafter to belong to, Commissioners appointed to take affidavits in and for the said Courts or either of them.

As to dis-
qualification
of Commis-
sioners.

XLVIII. Provided always, and be it enacted, that any person disqualified by the order of either of the said Courts from acting as such commissioner shall be thereupon disqualified from acting as such commissioner for all the said Courts.

Commence-
ment of act.

XLIX. And be it enacted, that, save where herein otherwise provided, this act shall commence and take effect on the last day of *Trinity* term next after the passing hereof.

19 & 20 VICT., CHAP. XCVII.

An Act to amend the Laws of England and Ireland affecting trade and Commerce.

[29th July, 1856.]

Whereas inconvenience is felt by persons engaged in trade by reason of the laws of *England* and *Ireland* being in some particulars different from those of *Scotland* in matters of common occurrence in the course of such trade, and with a view to remedy such inconvenience it is expedient to amend the laws of *England* and *Ireland* as herein-after is mentioned: be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Persons

I. No writ of fieri facias or other writ of execution, and no writ

of attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person *bona fide* and for a valuable consideration before the actual seizure or attachment thereof by virtue of such writ ; provided such person had not, at the time when he acquired such title, notice that such writ, or any other writ by virtue of which the goods of such owner might be seized or attached, had been delivered to and remained unexecuted in the hands of the sheriff, under sheriff, or coroner.

acquiring title to goods before they have been seized or attached under a writ against the seller, protected.

II. In all actions and suits in any of the superior Courts of common law at *Westminster* or *Dublin*, or in any Court of record in *England*, *Wales*, or *Ireland*, for breach of contract to deliver specific goods for a price in money, on the application of the plaintiff, and by leave of the Judge before whom the cause is tried, the jury shall, if they find the plaintiff entitled to recover, find by their verdict what are the goods in respect of the non-delivery of which the plaintiff is entitled to recover and which remain undelivered ; what (if any) is the sum the plaintiff would have been liable to pay for the delivery thereof ; what damages (if any) the plaintiff would have sustained if the goods should be delivered under execution, as herein-after mentioned, and what damages if not so delivered ; and thereupon, if judgment shall be given for the plaintiff, the Court or any judge thereof, at their or his discretion, on the application of the plaintiff, shall have power to order execution to issue for the delivery, on payment of such sum (if any) as shall have been found to be payable by the plaintiff as aforesaid, of the said goods, without giving the defendant the option of retaining the same upon paying the damages assessed ; and such writ of execution may be for the delivery of such goods ; and if such goods so ordered to be delivered, or any part thereof, cannot be found, and unless the Court, or such Judge or Baron as aforesaid, shall otherwise order the Sheriff, or other officer of such Court of record, shall distrain the defendant by all his lands and chattels, in the said Sheriff's bailiwick, or within the jurisdiction of such other Court of record, till the defendant deliver such goods, or, at the option of the plaintiff, cause to be made of the defendant's goods the assessed value or damages, or a due proportion thereof ; provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages, costs, and interest in such action or suit.

Specific delivery of goods sold.

III. No special promise to be made by any person after the passing of this act to answer for the debt, default, or miscarriage of another person being in writing, and signed by the party to be charged therewith or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.

Consideration for guarantee need not appear by writing.

Guarantee to or for a firm to cease upon a change in the firm, except in special cases.

IV. No promise to answer for the debt, default, or miscarriage of another made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt, default, or miscarriage of a firm consisting of two or more persons, or of a single person trading under the name of a firm, shall be binding on the person making such promise in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm, or in the person trading under the name of a firm, unless the intention of the parties that such promise shall continue to be binding notwithstanding such change shall appear, either by express stipulation or by necessary implication from the nature of the firm or otherwise.

A surety who discharges the liability, to be entitled to assignment of all securities held by the creditor.

V. Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding, at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: Provided always, that no co-surety, co-contractor, or co-debtor, shall be entitled to recover from any other co-surety, co-contractor, or co-debtor by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last mentioned person shall be justly liable.

Acceptance of a bill inland or foreign to be in writing on it, and signed by the acceptor or his agent. What are to be deemed "inland bills."

VI. No acceptance of any bill of exchange, whether inland or foreign, made after the thirty-first day of December one thousand eight hundred and fifty-six, shall be sufficient to bind or charge any person, unless the same be in writing on such bill, or if there be more than one part of such bill, on one of the said parts, and signed by the acceptor or some person duly authorized by him.

VII. Every bill of exchange or promissory note drawn or made in any part of the United Kingdom of *Great Britain and Ireland*, the islands of *Man, Guernsey, Jersey, Alderney, and Sark*, and the islands adjacent to any of them, being part of the dominions of Her Majesty, and made payable in or drawn upon any person resident in any part of the said United Kingdom or is-

lands, shall be deemed to be an inland bill; but nothing herein contained shall alter or affect the stamp duty, if any, which, but for this enactment, would be payable in respect of any such bill or note.

VIII. In relation to the rights and remedies of persons having claims for repairs done to, or supplies furnished to or for, ships, every port within the United Kingdom of *Great Britain and Ireland*, the islands of *Man, Guernsey, Jersey, Alderney, and Sark*, and the islands adjacent to any of them, being part of the dominions of Her Majesty, shall be deemed a home port.

With reference to the repairs of ships, every port within the United Kingdom, &c. a home port.

IX. All actions of account or for not accounting, and suits for such accounts, as concern the trade of merchandise between merchant and merchant, their factors or servants, shall be commenced and sued within six years after the cause of such actions or suits or when such cause has already arisen then within six years after the passing of this act; and no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action or suit.

Limitations of actions for "merchants' accounts."

X. No person or persons who shall be entitled to any action or suit with respect to which the period of limitation within which the same shall be brought is fixed by the act of the twenty-first year of the reign of King *James* the first, chapter sixteen, section three, or by the act of the fourth year of Queen *Anne*, chapter sixteen, section seventeen, or by the act of the fifty-third year of the reign of King *George* the third, chapter one hundred and twenty-seven, section five, or by the acts of the third and fourth years of the reign of King *William* the fourth, chapter twenty-seven, sections forty, forty-one, and forty-two, and chapter forty-two, section three, or by the act of the sixteenth and seventeenth years of the reign of Her present Majesty, chapter one hundred and thirteen, section twenty, shall be entitled to any time within which to commence and sue such action or suit beyond the period so fixed for the same by the enactments aforesaid, by reason only of such person or some one or more of such persons being at the time of such cause of action or suit accrued beyond the seas, or in the cases in which by virtue of any of the aforesaid enactments imprisonment is now a disability, by reason of such person or some one or more of such persons being imprisoned at the time of such cause of action or suit accrued.

Absence beyond seas or imprisonment of a creditor not to be a disability.

XI. Where such cause of action or suit with respect to which the period of limitation is fixed by the enactments aforesaid or any of them lies against two or more joint debtors, the person or persons who shall be entitled to the same shall not be entitled any time within which to commence and sue any such action or

Period of limitation to run as to joint debtors in the kingdom though some are beyond seas.

Judgment recovered against joint debtors in the kingdom to be no bar to proceeding against others beyond seas after their return.

Definition of "beyond seas" within 4 & 5 Anne, c. 16, and this Act.

Provisions of 9 G. 4, c. 14, ss. 1 & 8, and 16 & 17 Vict. c. 113, ss. 24 & 27, extended to acknowledgments by agents.

Part payment by one contractor, &c. not to prevent bar by certain statutes of limitations in favour of another contractor, &c.

Rules and regulations may be made and writs and proceedings framed for the purposes of this Act.

suit against any one or more of such joint debtors who shall not be beyond the seas at the time such cause of action or suit accrued, by reason only that some other one or more of such joint debtors was or were at the time such cause of action accrued beyond the seas, and such person or persons so entitled as aforesaid, shall not be barred from commencing and suing any action or suit against the joint debtor or joint debtors who was or were beyond seas at the time the cause or action accrued after his or their return from beyond seas, by reason only that judgment was already recovered against any one or more of such joint debtors who was not or were not beyond seas at the time aforesaid.

XII. No part of the United Kingdom of *Great Britain* and *Ireland*, nor the islands of *Man*, *Guernsey*, *Jersey*, *Alderney*, and *Sark*, nor any islands adjacent to any of them, being part of the dominions of Her Majesty, shall be deemed to be beyond seas within the meaning of the act of the fourth and fifth years of the reign of Queen *Anne*, chapter sixteen, or of this act.

XIII. In reference to the provisions of the acts of the ninth year of the reign of King *George* the fourth, chapter fourteen, sections one and eight, and the sixteenth and seventeenth years of the reign of Her present Majesty, chapter one hundred and thirteen, sections twenty-four and twenty-seven, an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorized to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself.

XIV. In reference to the provisions of the acts of the twenty-first year of the reign of King *James* the first, chapter sixteen, section three, and of the act of the third and fourth years of the reign of King *William* the fourth, chapter forty-two, section three, and of the act of the sixteenth and seventeenth years of the reign of Her present Majesty, chapter one hundred and thirteen, section twenty, when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator, shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money, by any other or others of such co-contractors or co-debtors, executors or administrators.

XV. In order to enable the superior Courts of common law at *Westminster* and *Dublin*, and the Judges thereof respectively, to make rules and regulations, and to frame writs and proceedings, for the purpose of giving effect to this act, the two hundred and twenty-third and two hundred and twenty-fourth sections of "The Common Law Procedure Act, 1852," shall, so far as this act is to take effect in *England*, and the two hundred and thirty-third and two hundred and fortieth sections of "The Common

Law Procedure Amendment Act (*Ireland*), 1853," shall, so far as this act is to take effect in *Ireland*, be incorporated with this act, as if those provisions had been severally herein repeated and made to apply to this act.

XVI. In citing this act it shall be sufficient to use the expression "The Mercantile Law Amendment Act, 1856." Short title

XVII. Nothing in this act shall extend to *Scotland*.

Extent of
act.

20 & 21 VICT., CHAP. VI.

An Act to alter the Constitution and amend the Procedure of the Court of Exchequer Chamber in Ireland.

[3rd July, 1857.]

Whereas by an act of the session of the parliament of *Ireland* holden in fortieth year of the reign of His late Majesty King *George* the third, chapter thirty-nine, writs of error upon judgments of the superior Courts of law in *Ireland* were made returnable in the Court thereby constituted, and since commonly called the Court of Exchequer Chamber, and the chief justices, chief barons, and the rest of the justices and barons, or any nine of them assembled in the said Court, were empowered to examine and affirm or reverse such judgments : and whereas by an act of the session of parliament holden in the first year of the reign of His late Majesty King *George* the fourth, chapter sixty-eight, increased powers were given to the said Court of Exchequer Chamber : and whereas by the "Common Law Procedure Amendment Act (*Ireland*), 1853," and the "Common Law Procedure Amendment Act (*Ireland*), 1856," further provision was made for the bringing of error and appeals into the said Court of Exchequer Chamber : and whereas it is expedient that the procedure in error in the said Court should be rendered uniform, and that all proceedings in error and upon appeals brought into the said Court on judgments and other proceedings of any of the Courts of Queen's Bench, Common Pleas, and Exchequer should be before the justices only, or justices and barons only, as the case may be, of the two other of the said last-mentioned Courts: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows :

I. In all cases in which error or an appeal shall, after the passage of this act, be brought into the said Court of Exchequer Chamber, the same shall be heard and determined by the justices only, or by the justices and barons, as the case may be, of the said Court. Appeal
from one
9*

Court to
judges of
two other
Courts.

ing of this act be brought into the said Court of Exchequer Chamber upon any judgment or other proceeding of any of the Courts of Queen's Bench, Common Pleas, or Exchequer, the proceedings in the said Court of Exchequer Chamber in error, or upon such appeal, shall be before the chief justices and justices only, or chief justice and justices, chief baron and barons only, as the case may be, of the two other of the said Courts, or any six or more of them.

Act not to
affect Chief
Justices or
Chief Baron.

II. Nothing in this act contained shall in any way affect the power or jurisdiction of either of the chief justices or the chief baron to fix the sittings of the said Court, or (save in proceedings in error or upon appeal, to which the last preceding section shall apply,) to do any other thing in or relating to the said Court.

Procedure in
error shall
be uniform.

III. In order that the procedure in error in the said Court of Exchequer Chamber upon all judgments and proceedings of the superior Courts of law may be rendered, so far as possible, uniform, the enactments of the "Common Law Procedure Amendment Act (*Ireland*), 1853," with respect to the bringing of error into the said Court of Exchequer Chamber, and the rules and orders made or to be made in pursuance of the said act, shall extend to and include the bringing of error in the said Court of Exchequer Chamber upon all judgments and proceedings of the Court of Chancery as a Court of Law, of the Courts of Queen's Bench, Common Pleas, and Exchequer, as well in crown as in all other cases in which error upon such judgments or proceedings may now be brought in the said Court of Exchequer Chamber; and the procedure in error in the said Court of Exchequer Chamber, and the proceedings consequent thereon, shall, so far as practicable, in all such cases be pursuant to the said "Common Law Procedure Amendment Act (*Ireland*), 1853," and the said rules made or to be made under the said act: provided, that nothing in this act contained shall be construed to enable error to be brought in cases in which error cannot now be brought: provided also, that where any fiat or consent is now required in any proceeding in error, such fiat or consent shall continue to be required in the corresponding proceeding in error under this act.

No error to
be brought
in cases in
which error
cannot now
be brought.

Power to
make Gene-
ral Orders.

IV. The power to make general orders for the said Court of Exchequer Chamber under section two hundred and thirty-three of the "Common Law Procedure Amendment Act (*Ireland*), 1853," shall extend to all proceedings in error in the said Court.

24 & 25 VICT., CHAP. XLIII.

An Act to facilitate the Remedies on Bills of Exchange and Promissory Notes in Ireland by the Prevention of frivolous or fictitious Defences to Actions thereon.

[22nd July, 1861.]

Whereas *bona fide* holders of dishonored bills of exchange and promissory notes are often unjustly delayed and put to unnecessary expense in recovering the amount thereof by reason of frivolous or fictitious defences to actions thereon, and it is expedient that greater facilities than now exist should be given for the recovery of money due on such bills and notes: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows:

I. From and after the twenty-first day of *October* one thousand eight hundred and sixty-one, all actions upon bills of exchange or promissory notes commenced within six months after the same shall have become due and payable, may, in case the plaintiff shall desire to proceed under this act, be commenced as herein-after mentioned; that is to say, the summons and plaint shall be in the form prescribed by The Common Law Procedure Amendment Act (*Ireland*), 1853; but, in addition thereto, and to any particulars or indorsements required by the said act, such summons and plaint shall have at the head thereof a notice in the form contained in the schedule (A.) to this act annexed; and in any case in which the summons and plaint shall be in such form it shall not be lawful for the defendant to file any appearance or defence to the said action unless he shall obtain leave from a Judge, as herein-after mentioned, so to appear and defend; and in default of his obtaining such leave, or of appearance and defence in pursuance thereof, the plaintiff shall be entitled to mark judgment with costs, in pursuance of the provisions of The Common Law Procedure Amendment Act (*Ireland*), 1853, for any sum not exceeding the sum mentioned in the notice at the commencement of the summons and plaint.

From and after 21st Oct. 1861, all actions upon bills of exchange, &c. may, if Plaintiff desires to proceed under this Act, be in the form prescribed by 16 & 17 Vict. c. 113, with additions thereto, as herein specified.

In order that a plaintiff may be able to avail himself of the benefit of the present statute, there are two requisites which, as may be observed, must exist: (1).—The action must be brought on a bill of exchange or promissory note. (2).—The action must be commenced within six months after the bill or note has become payable. As regards the first requisite, it has been held that the act applies to cheques or drafts or orders on bankers (*Eyre v. Waller*, 5 H. & N. 460). The summons and plaint may

In what cases plaintiff may proceed under act.

in addition to the usual counts on bills of exchange, include one upon an account stated, if the particulars endorsed be limited to the bill sued on (*Gray v. Murphy*, 12 Ir. C. L. R. 547); but where the summons and plaint contained counts for money lent, money paid, etc. it was set aside (*Parkinson v. Cook*, 7 Ir. Jur. N. S. 335). As regards the period within which the action may be brought, the statute, as may be observed, requires that the action shall be brought within six months after the bill or note shall have become due and payable. When the bill or note is payable on demand the six months mentioned in the act runs from the date of the note, (*Maltby v. Murrells*, 5 H. & N. 813). Where however the writ is issued after the prescribed period, the writ although irregular, is not void, and the irregularity may be waived by the laches of the defendant (*id*). A summons and plaint issued under the act will not be demurrable because it does not appear that the cause of action arose within six months (*Devereux v. Morrissey*, 17 Ir. C. L. R. 785).

Amending writ.

The Court may amend a writ improperly issued under the present act, and make it a good ordinary writ (*Leigh v. Baker*, 2 C. B. N. S. 367); and see as to amending a defect in the writ *Knight v. Pocock*, 17 C. B. 177; where the amount at the corner of the bill was larger than that in the body, the Court refused to set the writ aside (*Hall v. Coates*, 25 L. J., Ex. 3).

Action against executors.

A question has arisen in some cases in England as to whether an action can be brought against an executor under the corresponding English act (See *In re Skeggs*, 5 Jur. N. S. 325; *Leigh v. Baker*, 2 C. B. N. S. 370). The difficulty, however, would appear to be principally attributable to the form of judgment contained in the schedule annexed to the English act, and upon principle there is no reason why an executor should not be liable to be sued under the act; and see *McStevens v. Hartley*, 20 L. T. N. S. 225.

Costs.

Where an action is brought under the present act, the right to costs is subject to the limitations contained in sect. 243 of the C. L. P. Act, 1853, and sect 97 of the C. L. P. Act, 1856 (*Copland v. Armstrong*, 13 Ir. C. L. R., Ap. 46), and see as to the costs of actions brought on bill of exchange, or other negotiable instruments, *ante* p. lxxix.

Defendant showing a defence upon the merits, to have leave to appear.

II. A Judge of any of the superior Courts of Common Law in Ireland may, upon application made within the period of twelve days from such service, or at any time before judgment marked, give leave to appear and defend such action on the defendant paying into Court the sum claimed by the summons and plaint, or upon affidavits satisfactory to the Judge, which disclose a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Judge may deem sufficient to support the application, and on such terms as to security or otherwise as to the Judge may seem fit.

Obtaining leave to defend.

The defendant may, as will be observed, obtain leave to defend in all cases by paying into Court the sum claimed by the summons and plaint. He may also obtain leave to defend upon an affidavit disclosing a legal

or equitable defence, or disclosing such facts as make it incumbent on the holder of the bill to prove consideration, or such other facts as the Judge may deem sufficient to support the application.

An application for leave to appear and defend should be made to a Judge and not to the Court (*Andrews v. Ball*, 7 Ir. Jur. N. S. 13). The application, except where the defendant is willing to pay into Court the sum claimed, must be supported by an affidavit disclosing the grounds upon which the leave is sought. As to the nature of the defence which must be disclosed by the affidavits, reference may be made to *Agra and Masterman's Bank v. Leighton*, L. R. 2 Ex. 56, where it is laid down that the intention of the Bills of Exchange Act was, that where there was no pretence for a defence, the party sued should not be allowed to defend, and the holder should have judgment as of course; but that if the defendant had a real, not to say a good, defence, he should have leave to appear and set it up. The act does not require the Court or Judge to try the merits of the action; and it requires leave to appear to be specially granted only in order to prevent vexatious and unfounded defences; and, as a general rule, a defendant will be let in to defend where there is any defence suggested, either in law or in fact, which there is any reasonable ground for supposing may possibly be supported (*Mathews v. Marsland*, 27 L. J. Ex. 148, S. P.; *Clay v. Turley*, *id.* 2). The mere belief of the defendant that the plaintiff is not a *bona fide* holder, and has notice of an agreement with a former holder not to look to the defendant for payment, is not enough when contradicted by affidavits in reply (*Garnett v. O'Connor*, 7 Ir. Jur. N. S. 367). When a defendant applies for leave to defend upon the ground that he never signed the bill or authorized any one to sign it for him, the affidavit should state that the defendant has inspected the bill before swearing the affidavit, or account for not having done so.

A defendant sued under the present act cannot demur without leave (*Magrath v. O'Gorman*, 10 Ir. Jur. N. S. 114); neither will the time for pleading be extended without an affidavit (*Hewatt v. Fitzsimons*, Ir. R. 2 C. L. 34). Demurring.
Extending time to plead.

Where an order giving leave to appear and defend has been fraudulently obtained upon an *ex parte* application, the Court will rescind the order (*Pollock v. Turncock*, 1 H. & N. 741; and see *Esdaile v. Ramsay*, 10 W. R. 20). As to appealing to the Court from an order of a Judge granting or refusing leave to defend, see *Smith v. Dive*, 6 Jur. N. S. 1016; *Brutton v. Thomas*, 1 F. & F. 877; *Febart v. Stevens*, 30 L. J. Ex. 1. As a general rule the Court will not interfere with the discretion of the Judge. Rescinding order.

If the defendant's residence be incorrectly described in the summons and plaint, and he be thereby prejudiced, the misdescription will be ordered to be amended at the cost of the plaintiff (*Silk v. Armstrong*, Ir. R. 2 C. L. 155). As to compelling a plaintiff residing out of the jurisdiction to give security for costs, see *Jackson v. Barton*, 8 Ir. Jur. N. S. 131; *Martin v. Wilson*, 7 Ir. Jur. N. S. 335; referred to *ante* p. 50. As a general rule the defendant before applying for security must have obtained liberty to appear and defend. Residence.
Security for costs.

Judge may
under
special cir-
cumstances,
set aside
judgment.

III. After judgment the Court or a Judge may, under special circumstances, set aside the judgment, and, if necessary, stay or set aside execution, and may give to appear and defend the action, if it shall appear to be reasonable to the Court or Judge to do so, and on such terms as to the Court or Judge may seem just.

Judge may
order bill to
be deposited
with officer
of Court
in certain
cases.

IV. In any proceedings under this act it shall be competent to the Court or a Judge to order the bill or note sought to be proceeded upon to be forthwith deposited with an officer of the Court, and further to order that all proceedings shall be stayed until the plaintiff shall have given security for the costs thereof.

Remedy for
the recovery
of expenses
of noting
non-accept-
ance of
dishonoured
bill.

V. The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment, or otherwise, by reason of such dishonour, as he has under this act for the recovery of the amount of such bill or note.

Common
Law Proce-
dure acts
and rules
made under
them in-
corporated.

VI. The provisions of the "Common Law Procedure Amendment Act (*Ireland*), 1853," and the "Common Law Procedure Amendment Act (*Ireland*), 1856," and all rules made under or by virtue of either of the said acts, shall, so far as the same are or may be made applicable, extend and apply to all proceedings to be had or taken under this act.

Judges
to frame
rules.

VII. The Judges of the superior Courts of Common Law in *Ireland* shall have power to frame all rules and process necessary thereto.

Extent of
act.

VIII. This act shall apply to *Ireland* only.

Short title.

IX. In citing this act in any instrument, document, or proceeding, it shall be sufficient to use the expression "The Summary Procedure on Bills of Exchange (*Ireland*), Act, 1861."

SCHEDULE REFERRED TO IN THE FOREGOING ACT.

A.

The following notice is to be printed at the commencement of the summons and plaint, and before the name and title of Her Majesty.

The defendant [*Richard Roe*] is hereby warned and required to take notice,

That this action being brought on the undermentioned bill of

exchange [or promissory note] is brought under the "Summary Procedure on Bills of Exchange (Ireland) Act, 1861;" and that unless within twelve days from the service hereof he shall obtain leave from one of the Judges of the superior Courts of Common Law in Dublin to appear and defend the action, and shall within that time file his appearance and defence, the plaintiff [*John James*] will be entitled, without any further notice whatever, to issue execution against him for the sum of _____ pounds [here state the sum claimed], and the costs of this action.

Leave to appear may be obtained on an application to any of the Judges, supported by affidavit, showing that there is a defence to the action on the merits, or that it is reasonable that the defendant should be allowed to appear and defend the action, or by lodging the amount claimed in Court.

25 VICT., CHAP. XXIII.

An Act to Amend "The Summary Procedure on Bills of Exchange (Ireland) Act, 1861."

[3rd June, 1862.]

Whereas it is, amongst other things, enacted by the sixth section of "The Summary Procedure on Bills of Exchange (Ireland) Act, 1861," that the provisions of "The Common Law Procedure Amendment (Ireland) Act, 1853," shall, as far as the same are or may be made applicable, extend and apply to all proceedings to be had or taken under the said "Summary Procedure on Bills of Exchange (Ireland) Act, 1861," and it is expedient to amend the said sixth section as herein-after provided: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows:

24 & 25
Vict. c. 43.

I. In all actions upon bills of exchange or promissory notes commenced pursuant to the provisions of "The Summary Procedure on Bills of Exchange (Ireland) Act, 1861," the days for appearing and filing a defence to the writ of summons and plaint shall run in vacation as well as in term time, without excepting the days from the first day of *August* to the twentieth day of *October* inclusive, notwithstanding the provisions of "The Common Law Procedure (Ireland) Act, 1853."

In actions upon bills of exchange or promissory notes, the days for appearing and filing a defence to run in vacation.

The days from 1st August to 20th October, to be reckoned days within which summons, &c. should be filed.

This and recited Act to be as one.

Short title.

II. In all such actions the days from and including the first day of *August* to the twentieth day of *October* inclusive in each year shall be reckoned days within which the summons and plaint and defence should be filed, and on such days such summons and plaint, or defence, shall be filed and received, notwithstanding the provisions of "The Common Law Procedure (*Ireland*) Act, 1853."

III. This act and "The Summary Procedure on Bills of Exchange (*Ireland*) Act, 1861," shall be incorporated and constructed together as one act.

IV. This act may be cited for all purposes as "The Summary Procedure on Bills of Exchange (*Ireland*) Act, 1862."

27 & 28 VICT., CHAP. XCV.

An Act to Amend the Act ninth and tenth Victoria, Chapter ninety-three, for compensating the Families of Persons killed by Accident.

[29th July, 1864.]

9 & 10 Vict.
c. 93.

Whereas by an act passed in the session of parliament holden in the ninth and tenth years of Her Majesty's reign, intituled *An Act for Compensating the Families of Persons Killed by Accident*, it is amongst other things provided, that every such action as therein mentioned shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused as therein mentioned, and shall be brought by and in the name of the executor or administrator of the person deceased : and whereas it may happen by reason of the inability or default of any person to obtain probate of the will or letters of administration of the personal estate and effects of the person deceased, or by reason of the unwillingness or neglect of the executor or administrator of the person deceased to bring such action as aforesaid, that the person or persons entitled to the benefit of the said act may be deprived thereof ; and it is expedient to amend and extend the said act as herein-after mentioned : be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows :

Where no action brought

I. If and so often as it shall happen at any time or times hereafter in any of the cases intended and provided for by the said act

that there shall be no executor or administrator of the person deceased, or that there being such executor or administrator no such action as in the said act mentioned shall within six calendar months after the death of such deceased person as therein mentioned have been brought by and in the name of his or her executor or administrator, then and in every such case such action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been, if it had been brought by and in the name of such executor or administrator; and every action so to be brought shall be for the benefit of the same person or persons, and shall be subject to the same regulations and procedure as nearly as may be, as if it were brought by and in the name of such executor or administrator.

within six months by executor of person killed, then action may be brought by persons beneficially interested in result of action.

II. And whereas by the second section of the said act it is provided that the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and whose benefit such action shall be brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided between the before-mentioned parties in such shares as the jury shall by their verdict direct: be it enacted and declared, that it shall be sufficient, if the defendant is advised to pay money into Court, that he pay it as a compensation in one sum to all persons entitled under the said act for his wrongful act, neglect, or default, without specifying the shares into which it is to be divided by the jury: and if the said sum be not accepted, and an issue is taken by the plaintiff as to its sufficiency, and the jury shall think the same sufficient, the defendant shall be entitled to the verdict upon that issue.

Money paid into Court may be paid in one sum, without regard to its division into shares.

If not accepted defendant entitled to verdict on the issue.

III. This act and the said act shall be read together as one act.

This and recited Act to be read as one.

27 & 28 VICT., CHAP. XCIX.

An act to amend the procedure of the Civil Bill Courts in Ireland.

[29th July, 1864.]

IX. If a Judge of a superior Court shall be satisfied that a party against whom judgment for an amount exceeding twenty pounds, exclusive of costs, has been obtained in a Civil Bill Court, has no goods or chattels which can be conveniently taken to satisfy such judgment, he may, if he shall think fit, and on such terms as to costs as he may direct, order a writ of certiorari to

Judge may order writ of certiorari to remove judgment of Civil Bill Court into Superior Court.

issue to remove the judgment of the Civil Bill Court into one of the superior Courts, and when removed it shall have the same force and effect and the same proceedings may be had thereon as in the case of a judgment of such superior Court, but no action shall be brought upon such judgment.

Judge of assize may state case for opinion of superior Courts.

XXXV. It shall be lawful for any Judge of assize, upon the trial of any appeal, to direct a special case to be stated for the opinion of a superior Court of Common Law in *Ireland* in case any question of law shall arise before him on the trial of any appeal which in his judgment may be proper to be decided by a superior Court of Common Law, and the case when stated shall be signed by the Judge, and the appellant shall lodge the case, and take all other necessary steps to have the case set down for hearing before one of the said superior Courts of Common Law within such time as any general rule to be made as herein-after provided shall require, and in default of his so doing the decree shall stand affirmed with costs, unless on special application the Judge shall otherwise order.

Courts of Common Law shall finally hear and determine such cases.

XXXVI. The several superior Courts of Common Law in *Ireland* are hereby empowered to hear and determine such special cases when submitted to them, and for that purpose they shall severally have and exercise all the powers vested by this or any other act in the Judge of assize in respect of said cases, and on said cases the decision made by any superior Court of Common Law shall be final and conclusive.

Special case may be amended.

XXXVII. Any superior Court of Common Law before whom any case may be pending may direct said case to be amended by consent of the parties, or on the certificate of the Judge who signed said case.

Judges to make rules.

XXXVIII. The Judges of the Queen's Bench in *Ireland* shall, as soon as may be convenient after the passing of this act, make rules and regulations, and may from time to time alter and amend said rules and regulations, for the hearing and disposal of all such special cases as may be stated by a Judge of assize for the decision of a superior Court of Common Law, and for regulating the costs of said proceedings, and for directing when and where such cases shall be lodged, and for providing that all such cases shall be distributed in rotation among the three superior Courts of Common Law in *Ireland*.

See the rules and regulations made in pursuance of the Act, *ante*, p. lxxv.

Cost of special case.

XXXIX. In addition to any costs now by law recoverable from any unsuccessful party on an appeal, it shall be lawful to recover from such party such additional costs as may be awarded by the Court by whom the special case shall be decided, not exceeding in any case the costs to be fixed by any general rule as aforesaid.

31 & 32 VICT., CHAP. LIV.

An Act to render Judgments or Decrees obtained in certain Courts in England, Scotland, and Ireland respectively, effectual in any other part of the United Kingdom.

[13th July, 1868.]

Be it enacted, by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same as follows :—

I. Where judgment shall hereafter be obtained or entered up in any of the Courts of Queen's Bench, Common Pleas, or Exchequer, at *Westminster* or *Dublin* respectively for any debt, damages, or costs, on production to the Master of the Court of Common Pleas at *Dublin* where such judgment shall have been obtained or entered up in any of the said Courts in *England*, or to the Senior Master of the court of Common Pleas at *Westminster*, where such judgment shall have been obtained or entered up in any of the said courts in *Ireland*, of a certificate of such judgment in one of the forms contained in the schedule hereto annexed as the case may be, purporting to be signed by the proper officer of the court where such judgment has been obtained or entered up, such certificate shall be registered by such Master in a register to be kept in the Court of Common Pleas at *Dublin* and at *Westminster* respectively for that purpose, and to be called in the Court of Common Pleas at *Dublin* "The Register for *English* Judgments," and to be called in the Court of Common Pleas at *Westminster* "The Register for *Irish* Judgments," and shall from the date of such registration be of the same force and effect, and all proceedings shall and may be had and taken on such certificate, as if the judgment of which it is a certificate had been a judgment originally obtained or entered up on the date of such registration as aforesaid in the Court in which it is so registered, and all the reasonable costs and charges attendant upon the obtaining and registering such certificate shall be recovered in like manner as if the same were part of the original judgment ; provided always, that no certificate of any such judgment shall be registered as aforesaid more than twelve months after the date of such judgment, unless application shall have been first made to and leave obtained from the Court or a Judge of the Court in which it is sought to register such certificate.

Where judgment has been obtained in the Courts at Westminster, a certificate thereof registered in Ireland, and *vice versa*, shall have the effect of a judgment of the Court in which it is so registered.

Where a certificate of an English judgment had been entered in the Court of Common Pleas, pursuant to the present statute, on motion to set aside the judgment entered, on the ground that the English judgment on which the certificate was founded was irregularly entered up as a final

judgment, while demurrers to some of the pleas were still undecided ; it was held that there was no judgment of the Irish Court, but merely an entry of record of the certificate of the English judgment, that the certificate of the proper officer in England was conclusive on such a motion that there was such a final judgment ; and that a subsequent order of the officer in England, staying all proceedings on the English judgment while the demurrers remained undisposed of, had no application to the registry of the certificate in Ireland, which had been regularly done at the date of the order (*Bailey v. Wepley*, Ir. R. 4 C. L. 243).

Where judgment has been obtained in the Courts at Westminster or at Dublin, a certificate thereof registered in Scotland shall have the effect of a decret of the Court of Session.

II. Where judgment shall hereafter be obtained or entered up in any of the Courts of Queen's Bench, Common Pleas, or Exchequer at *Westminster* or *Dublin* respectively, for any debt, damages, or costs, on production at the office kept in *Edinburgh* for the registration of deeds, bonds, protests, and other writs registered in the books of council and session of a certificate of such judgment in one of the forms contained in the schedule hereto annexed, as the case may be, purporting to be signed by the proper officer of the Court where such judgment has been obtained or entered up, such certificate shall be registered in a book to be kept for that purpose, and to be called "The Register for *English* and *Irish* Judgments," in like manner as a bond executed according to the law of *Scotland*, with a clause of registration for execution therein contained; and every certificate so registered shall from the date of such registration be of the same force and effect as a decret of the Court of Session, and all proceedings shall and may be had and taken on an extract of such certificate as if the judgment of which it is a certificate had been a decret originally pronounced in the Court of Session on the date of such registration as aforesaid, and all the reasonable costs, charges, and expenses attendant upon the obtaining and registering such certificate shall be recovered in like manner as if the same were part of the original judgment ; provided always, that no certificate of any such judgment shall be registered as aforesaid more than twelve months after the date of such judgment, unless application shall have been first made to, and leave obtained from the Lord Ordinary on the bills.

Where decret has been obtained in the Court of Session, a certificate of an extract thereof registered in England or Ireland shall have the effect of a

III. On production to the senior Master of the Court of Common Pleas at *Westminster*, or to the Master of the Court of Common Pleas at *Dublin*, of the certificate in one of the forms contained in the schedule hereto annexed, as the case may be, of any extracted decret of the Court of Session in *Scotland*, which shall hereafter be obtained for the payment of any debt, damages, or expenses, purporting to be signed by the extractor of the Court of Session, or other officer duly authorized to make and subscribe extracts, or on production of the certificate of an extracted decret of registration in the books of council and session purporting to be

signed by the keeper of the register of deeds, bonds, protests, and other writs registered for execution in the books of council and session, which shall hereafter be obtained for the payment of any debt, damages, or expenses, such certificate shall be registered by such Master in a register to be kept in the Court of Common Pleas at *Westminster* and *Dublin* respectively for that purpose, and to be called the "Register for *Scotch* Judgments," and such certificate when so registered shall from the date of such registration be of the same force and effect as a judgment obtained or entered up in the Court in which it is so registered, and all proceedings shall and may be had and taken on such certificate as if the decret of which it is a certificate had been a judgment originally obtained or entered up on the date of such registration as aforesaid in the Court in which it is so registered, and all the reasonable costs, charges, and expenses attendant upon the obtaining and registering such certificate shall be recovered in like manner as if the same were part of the decret of which it is a certificate ; provided always, that no certificate shall be registered as aforesaid more than twelve months after the date of such decret, unless application shall have been first made to and leave obtained from the Court or a Judge of the Court in which it is so sought to register such certificate ; provided that where a note of suspension of any such decret shall have been passed or a sist of execution shall have been granted thereon by the said Court of Session or any Judge thereof, on the production of a certificate under the hand of the clerk to the bill chamber of the Court of Session, of the passing of such note or the granting of such sist to a Judge of the Court in which such certificate of such decret has been registered, execution on such registered certificate shall be stayed until a certificate be produced under the hand of the said clerk that such sist has been recalled or has expired, or, where the note of suspension has been passed, until there be produced an extract, under the hand of the Extractor of the Court of Session or other officer duly authorized to make and subscribe extracts, of a decret of the said Court repelling the reasons of suspension.

IV. The Courts of Common Pleas at *Westminster* and at *Dublin* and the Court of Session in *Scotland* shall have and exercise the same control and jurisdiction over any judgment or decret, and over any certificate of such judgment or decret, registered under this act in such Courts respectively as they now have and exercise over any judgment or decret in their own Courts, but in so far only as relates to execution under this act.

Courts here-
in named to
have con-
trol over
registered
judgments
or decreets
in so far
as relates to
execution.

V. It shall not be necessary for any plaintiff in any of the aforesaid Courts in *England* resident in *Ireland* or *Scotland*, or any plaintiff in any of the aforesaid Courts in *Ireland* resident in

No security
for costs
where
plaintiff

resides in
a different
part of the
Kingdom.

England or *Scotland*, in any proceeding had and taken on such certificate, to find security for costs in respect of such residence, unless on special grounds a Judge or the Court shall otherwise order; nor shall it be necessary for any party to such proceeding in *Scotland*, resident in *England* or *Ireland*, to sist a mandatory, or otherwise to find security for expenses in respect of such residence, unless on special grounds the Court shall otherwise order.

Costs not to
be allowed
in actions
on judgments
unless by
order of
Court.

VI. In any action brought in any Court in *England*, *Scotland*, or *Ireland* on any judgment or decret which might be registered under this act in the country in which such action is brought, the party bringing such action shall not recover or be entitled to any costs or expenses of suit unless the Court in which such action shall be brought, or some Judge of the same Court, shall otherwise order.

Judges to
make rules
for execution
of this
act.

VII. It shall be lawful for the Judges of the Court of Queen's Bench, Common Pleas, and Exchequer, at *Westminster* and *Dublin* respectively, or any eight or more of them respectively, of whom the chiefs of the said Courts respectively shall be three, and they are hereby required, from time to time, to make all such general rules and orders to regulate the practice to be observed in the execution of this act, or in any matter relating thereto, including the scale of fees to be charged in the Courts of Common Law in *England* and *Ireland* respectively, as they may deem to be necessary and proper; and it shall be lawful for the Court of Session in *Scotland*, and the said Court is hereby required from time to time, to make such acts of *sederunt* to regulate the practice to be observed in the execution of this act, or in any matter relating thereto, including the scale of fees to be charged in *Scotland*, as such Court may deem to be necessary and proper; provided always, that such rules, orders, and acts of *sederunt* respectively shall be laid before both Houses of Parliament within one month from the making thereof, if Parliament be then sitting, or if Parliament be not then sitting, within one month from the commencement of the then next session of Parliament.

Act not to
apply to
certain
decreets.

VIII. This act shall not apply to any decret pronounced in absence in an action proceeding on an arrestment used to found jurisdiction in *Scotland*.

Short title.

IX. In citing this act in any instrument, document, or proceeding it shall be sufficient to use the expression "The Judgments Extension Act, 1868."

SCHEDULE.

Certificate issued in terms of "The Judgments' Extension Act, 1868."

Form I.—*Where party applying is plaintiff or pursuer.*

I, _____, certify that [here state name, title, trade or profession, and usual or last known place of abode of plaintiff or pursuer] on the _____ day of _____, 18____, obtained judgment against [here state name and title, trade or profession, and usual or last known place of abode of defendant] before the Court of _____ for payment of the sum of _____ on account of [state shortly nature of claim or ground of action with the sum of costs, if any, and in case of a judgment obtained in an action, state whether it was obtained after appearance made by the defendant, or after service (personal or otherwise) of the action on the defendant, as the case may be].

(Signed by the proper officer of the Court from which the certificate issues.)

Form II.—*Where party applying is defendant or defender.*

I certify that [here state name, title, trade, or profession, and usual or last known place of abode of defendant or defender] on the _____ day of _____, 18____, obtained judgment against [state name, title, trade, or profession, and usual or last known place of abode of plaintiff or pursuer] before the Court of _____, for judgment of the sum of £ _____ as costs of suit.

(Signed by the proper officer of the Court from which the certificate issues.)

Minute of presentation to be appended to either form.

Presented for registration in terms of "The Judgments' Extension Act, 1868."

Signature of (Attorney, Law Agent, or Creditor) presenting for registration.

31 & 32 VICT., CHAP. LXIX.

An Act to assimilate the law in Ireland to the law in England as to costs in Actions of Libel.

[31st July, 1868.]

Whereas it is expedient to assimilate the law in *Ireland* to the law in *England*, as to costs in actions of libel, Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows :

When damages under forty shillings plaintiff not to get more costs than damages.

I. In all actions for libel, where the jury shall give damages under forty shillings, the plaintiff shall not be entitled to more costs than damages, unless the Judge before whom such verdict shall be obtained shall immediately afterwards certify on the back of the record that the libel was wilful and malicious.

To apply to Ireland only.
Short title.

II. This act shall not apply to England and Scotland, and for all purposes may be cited as the *Libel Act (Ireland)*, 1868.

33 & 34 VICT., CHAP. XCIII.*

An act to amend the law relating to the property of married women.

[9th August, 1870.]

Whereas it is desirable to amend the law of property and contract with respect to married women :

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows :

Earnings of married women to be deemed their own property.

I. The wages and earnings of any married woman acquired or gained by her after the passing of this act in any employment, occupation, or trade in which she is engaged or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom

* Although this statute does not directly relate to the subject of the present work, yet, as it has been referred to more than once (*ante*, pp. 53, 88, 179, 190), it has been considered desirable to insert it here.

she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property.

II. Notwithstanding any provision to the contrary in the act of tenth year of George the fourth, chapter twenty-four, enabling the commissioners for the reduction of the national debt to grant life annuities and annuities for terms of years, or in the acts relating to savings banks and post office savings banks, any deposit hereafter made and any annuity granted by the said commissioners under any of the said acts in the name of a married woman, or in the name of a woman who may marry after such deposit or grant, shall be deemed to be the separate property of such woman, and the same shall be accounted for and paid to her as if she were an unmarried woman; provided that if any such deposit is made by, or such annuity granted to, a married woman by means of moneys of her husband without his consent, the court may, upon an application under section nine of this act, order such deposit or annuity or any part thereof to be paid to the husband.

Deposits in savings banks by a married woman to be deemed her separate property.

Proviso.

III. Any married woman, or any woman about to be married, may apply to the governor and company of the Bank of England, or to the governor and company of the Bank of Ireland, by a form to be provided by the governor of each of the said banks and company for that purpose, that any sum forming part of the public stocks and funds, and not being less than twenty pounds, to which the woman so applying is entitled, or which she is about to acquire, may be transferred to or made to stand in the books of the governor and company to whom such application is made in the name or intended name of the woman as a married woman entitled to her separate use, and on such sum being entered in the books of the said governor and company accordingly, the same shall be deemed to be the separate property of such woman, and shall be transferred and the dividends paid as if she were an unmarried woman; provided that if any such investment in the funds is made by a married woman by means of moneys of her husband without his consent, the Court may, upon an application under section nine of this act, order such investment and the dividends thereof, or any part thereof, to be transferred and paid to the husband.

As to a married woman's property in the funds.

IV. Any married woman, or any woman about to be married, may apply in writing to the directors or managers of any incorporated or joint stock company that any fully paid up shares, or any debenture or debenture stock, or any stock of such company, to the holding of which no liability is attached, and to which the woman so applying is entitled, may be registered in the books of the said company in the name or intended name of the woman as a married woman entitled to her separate use, and it shall be the duty of such directors or managers to register such shares or stock accordingly, and the same upon being so registered shall be deemed to be the separate property of such woman, and shall be

As to a married woman's property in a joint stock company.

transferred and the dividends and profits paid as if she were an unmarried woman ; provided that if any such investment as last mentioned is made by a married woman by means of moneys of her husband without his consent, the Court may, upon an application under section nine of this act, order such investment and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband.

As to a married woman's property in a society.

V. Any married woman, or any woman about to be married, may apply in writing to the committee of management of any industrial and provident society, or to the trustees of any friendly society, benefit building society, or loan society, duly registered, certified, or enrolled under the acts relating to such societies respectively, that any share, benefit, debenture, right, or claim whatsoever in, to, or upon the funds of such society, to the holding of which share, benefit, or debenture no liability is attached, and to which the woman so applying is entitled, may be entered in the books of the society in the name or intended name of the woman as a married woman entitled to her separate use, and it shall be the duty of such committee or trustees to cause the same to be so entered, and thereupon such share, benefit, debenture, right, or claim shall be deemed to be the separate property of such woman, and shall be transferable and payable with all dividends and profits thereon as if she were an unmarried woman ; provided that if any such share, benefit, debenture, right, or claim has been obtained by a married woman by means of moneys of her husband without his consent, the Court may, upon an application under section nine of this Act, order the same and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband.

Deposit of moneys in fraud of creditors invalid.

VI. Nothing herein-before contained in reference to moneys deposited in or annuities granted by savings banks or moneys invested in the funds or in shares or stock of any company, shall as against creditors of the husband give validity to any deposit or investment of moneys of the husband made in fraud of such creditors, and any moneys so deposited or invested may be followed as if this Act had not passed.

Personal property not exceeding £200 coming to a married woman to be her own.

VII. Where any woman married after the passing of this Act shall during her marriage become entitled to any personal property as next of kin or one of the next of kin of an intestate, or to any sum of money not exceeding two hundred pounds under any deed or will, such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use, and her receipts alone shall be a good discharge for the same.

Freehold property coming to a married woman,

VIII. Where any freehold, copyhold, or customaryhold property shall descend upon any woman married after the passing of this Act as heiress or co-heiress of an intestate, the rents and profits of such property shall, subject and without prejudice to

the trusts of any settlement affecting the same, belong to such woman for her separate use, and her receipts alone shall be a good discharge for the same.

rents and profits only to be her own.

IX. In any question between husband and wife as to property declared by this act to be the separate property of the wife, either party may apply by summons or motion in a summary way either to the Court of Chancery in England or Ireland according as such property is in England or Ireland, or in England (irrespective of the value of the property) the judge of the County Court of the district in which either party resides, and thereupon the Judge may make such order, direct such inquiry, and award such costs, as he shall think fit; provided that any order made by such Judge shall be subject to appeal in the same manner as the order of the same Judge made in a pending suit or on an equitable plaint would have been, and the Judge may, if either party so require, hear the application in his private room.

How questions as to ownership of property to be settled.

X. A married woman may effect a policy of insurance upon her own life or the life of her husband for her separate use, and the same and all benefit thereof, if expressed on the face of it to be so effected, shall enure accordingly, and the contract in such policy shall be as valid as if made with an unmarried woman.

Married women may effect policy of insurance.

A policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate. When the sum secured by the policy becomes payable, or at any time previously, a trustee thereof may be appointed by the Court of Chancery in England or in Ireland according as the policy of insurance was effected in England or in Ireland, or in England by the judge of the County Court of the district, or in Ireland by the chairman of the Civil Bill Court of the division of the county in which the insurance-office is situated, and the receipt of such trustee shall be a good discharge to the office. If it shall be proved that the policy was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premiums so paid.

As to insurance of a husband for benefit of his wife.

XI. A married woman may maintain an action in her own name for the recovery of any wages, earnings, money and property by this act declared to be her separate property, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property, and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection

Married women may maintain an action.

and security of such wages, earnings, money, and property, and of any chattels or other property purchased or obtained by means thereof for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman; and in any indictment or other proceeding it shall be sufficient to allege such wages, earnings, money, chattels, and property to be her property.

Husband not to be liable on his wife's contracts before marriage.

XII. A husband shall not, by reason of any marriage which shall take place after this act has come into operation, be liable for the debts of his wife, contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy, such debts as if she had continued unmarried.

Commencement of act.

XV. This act shall come into operation at the time of the passing of this act.

Act not to extend to Scotland.

XVI. This act shall not extend to Scotland.

Short title.

XVII. This act may be cited as the "Married Women's Property Act, 1870."

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